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**THE PRACTICE**  
**OF**  
**THE COURT OF SESSION,**

**ON THE BASIS OF**

**THE LATE MR. DARLING'S WORK OF 1833.**

**BY**  
**CHARLES FARQUHAR SHAND, Esq.**  
**ADVOCATE.**

**IN TWO VOLUMES.**

**VOL. I.**

**EDINBURGH:**  
**T. & T. CLARK, LAW-BOOKSELLERS, 38. GEORGE STREET.**  
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**MDCCLXVIII.**

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TO

THE HONOURABLE

LORD IVORY,

ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE,

WITH DEEP RESPECT FOR

HIS GREAT ABILITIES AND HIGH JUDICIAL CHARACTER,

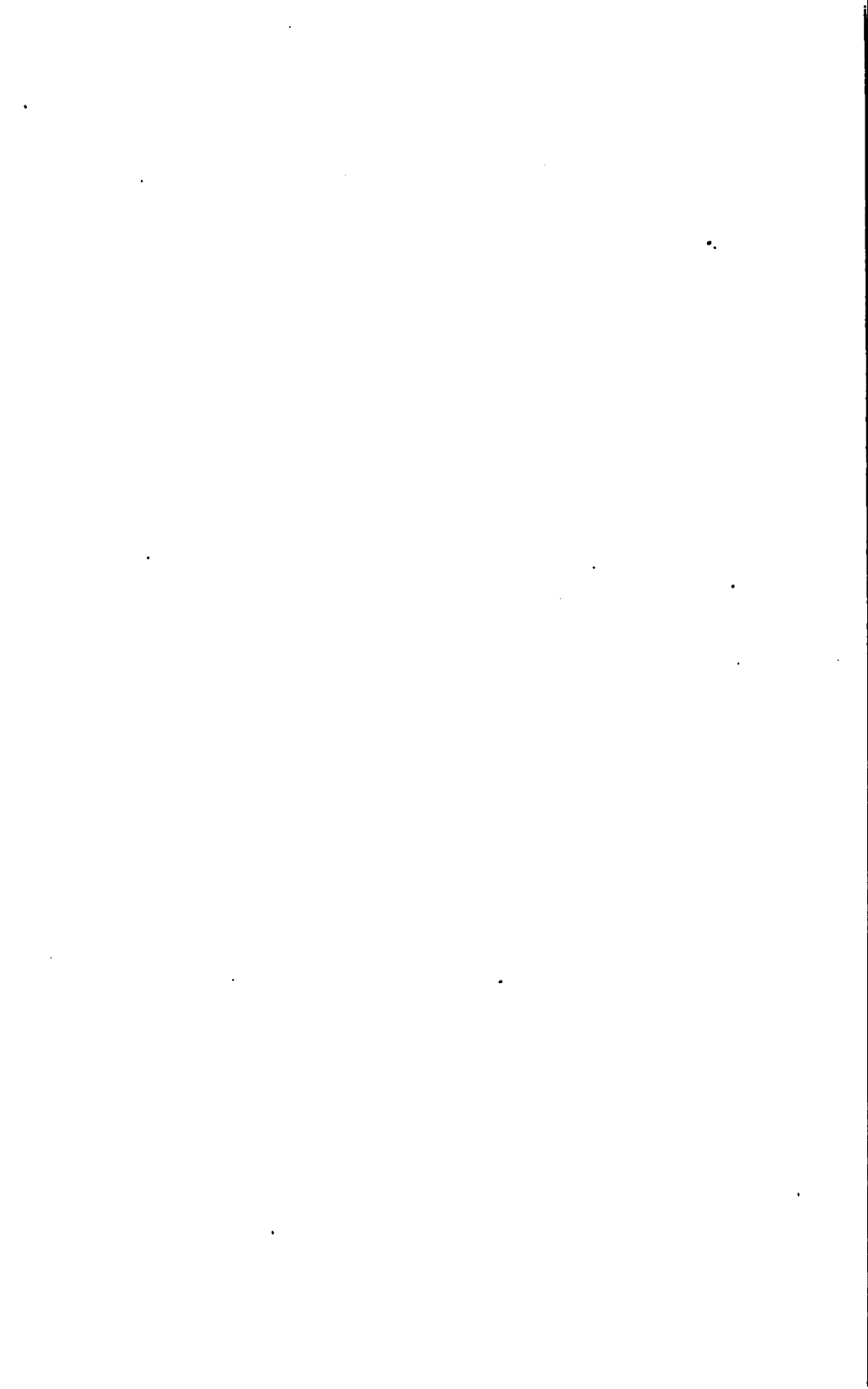
AND IN ACKNOWLEDGMENT OF

MUCH PERSONAL KINDNESS,

THIS TREATISE

IS INSCRIBED.





## P R E F A C E.

---

It was originally intended to reprint the work on the Practice of the Court, by the late Mr. James Johnston Darling, W. S., published in 1833, with such additions and alterations as appeared necessary to adapt it to the present time. It was soon found, however, that, owing to the extensive and important changes introduced in the course of the last fifteen years, a very large portion of Mr. Darling's Work is now no longer applicable to the present state of our Practice, and that the additions requiring to be made would, in amount, nearly equal what remained.

The plan of a New Edition of the former Treatise was therefore abandoned; but Mr. Darling's Work has been adopted as the groundwork of the present. The same arrangement,—(though probably not the best that might be suggested),—has in general been followed, and, excepting those instances where the chapters are entirely new, the additional matter has been incorporated with the old, so as to present an unbroken text.

In addition to the ordinary sources of information,

the contents of several extensive and valuable Manuscript Collections have been made available in the preparation of the present Treatise. The most important of those is the MS. "Forms of Proces"—now the Property of the late Lord President—by Mr. Alexander Tait,<sup>1</sup> one of the Principal Clerks of Session, from 1760 to 1780, which has frequently been quoted from the Bench and Bar as of very high authority. There is scarcely a chapter in the present work in which references to this manuscript do not occur,—either as confirming established rules of practice, and explaining the reasons on which they are founded,—or as stating the learned Author's opinion on points of form,—or as containing Decisions of the Court hitherto unpublished. In many instances the remarkably lucid and terse words of the original have been preserved.

Forms of the Interlocutors, Minutes, &c., used in the different actions, have been given in foot notes at the proper places. They are taken from the styles in daily use in the Court, to which ready access has been had, through the politeness of the official gentlemen, both in the Inner and Outer House. A short specimen of the mode in which the Minute-Book, the Calling List, and the different Rolls of Court, &c. are kept, has been given.

---

<sup>1</sup> "A gentleman of the most extensive experience, and to whom the profession is chiefly indebted for the valuable body of Acts of Sederunt, afterwards published by his son."—*Ivory's Form of Process*, ii. 54.

The Acts of the Parliament of Scotland, are cited both according to the arrangement in the older editions, still in general use, and the more correct enumeration followed by Mr. Thomson in his very valuable edition, and by Mr. Alexander in his useful Abridgment. A reference to Mr. Thomson's work, by the volume and page, is also subjoined in every instance. The dates of all the British Statutes quoted have been added.

In citing Decisions, the names of the parties have been fully stated, along with the date and volume and page of the work, in which the case is reported. In quoting cases contained in the first five volumes of Mr. Shaw's Reports, a reference has been given to both editions. The references throughout the work have been repeatedly and anxiously verified.

Mercantile Sequestration, which occupied a large portion of Mr. Darling's work, although occasionally noticed incidentally, has been omitted as the subject of a separate chapter. Under the present statute, much of the procedure in Sequestrations goes on before the Sheriff, and it was found impossible, without seriously interfering with the space allotted to subjects falling more peculiarly within the scope of the present treatise, to present anything like a tolerably complete summary,—and besides the subject has been fully noticed by other writers in systematic treatises on the Law of Bankruptcy.

The Chapter on Petitions by Heirs of Entail, for authority to redeem the Land Tax, has also been

omitted. No practical rule of any value can be here suggested beyond the necessity of following the statutory instructions with the most anxious minuteness.

The peculiarities of procedure in the Bill Chamber, and in Jury Causes after a remit to the Issue Clerks, —though frequently the subject of incidental remark —have not been fully discussed. To have done so would have extended the present Treatise beyond all reasonable limits.

To the Honourable Lord Ivory,—Professor More, —Mr. Parker, the Principal Extractor,—and Mr. Beveridge, Depute Clerk of Session,—the author is under great obligations for much valuable advice and assistance. Numerous friends, in both branches of the profession, have favoured him with useful suggestions, of all of which he has endeavoured to avail himself.

Besides a Table of Contents, a very copious Index has been added.

EDINBURGH, *July 1st*, 1848.

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<sup>1</sup> This list contains the unreported decisions referred to in Mr. Darling's work, and in a few instances the cases have been elsewhere collected, but by different reporters.

- Dallas v. M'Kaill, (*Advocation where Amount under £12*), p. 452.
- Dalderse, Ranking and Sale of, 22 Feb. and 28 June 1780, (*Part of Estate Omitted—Striking Subjects out of Sale*), p. 914, Note.
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## LIST OF ABBREVIATIONS USED IN CITING AUTHORITIES.

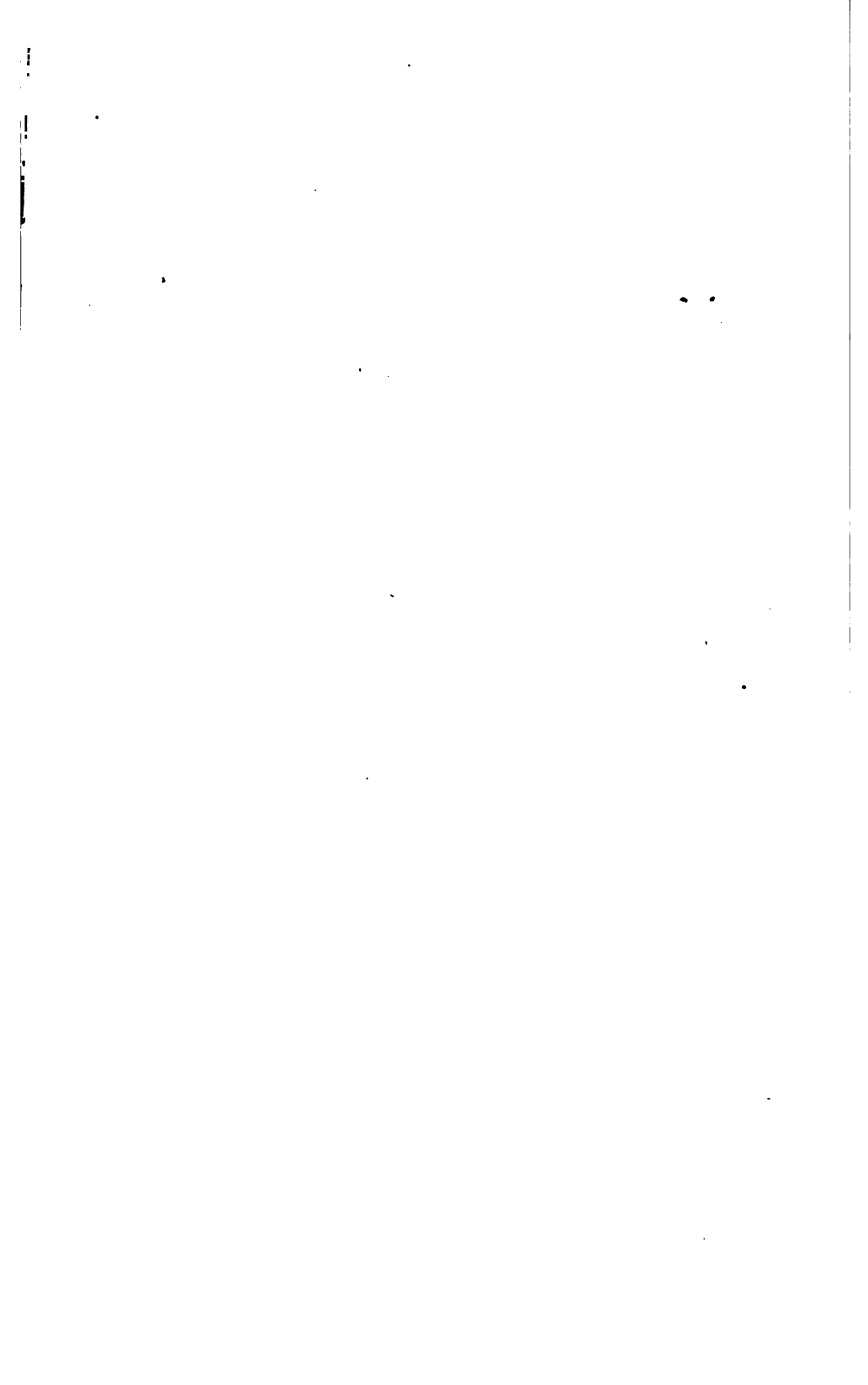
Abbot.....	Abbott's Law of Merchant Ships and Seamen, 8th Ed. 8vo. 1847.
A. S.....	Acts of Sederunt.
Acts of W.S. Society.....	Acts of the Society of Writers to the Signet.
Adam.....	A Practical Treatise on Trial by Jury, by Rt. Honble. Wm. Adam, 8vo. 1836.
Alexander.....	Alexander's Analysis of Heritable Securities Acts of 1845 and 1847, &c. 2d Ed. 8vo. 1848.
Alexander Abridgt.....	Alexander's Abridgment of Acts of Sederunt, 8vo. 1838, with Suppl. 1843.
Al. Prac.....	Practice of the Criminal Law of Scotland, by Archd. Alison, Advocate, 8vo. 1833.
Archbold's Practice.....	Archbold's Practice of the Court of Queen's Bench, 8th Ed. by Chitty, 8vo. 1845-1847.
Arkley.....	Arkley's Justiciary Reports, 8vo. 1846-1848, (current).
Balf.....	Practicks of the more Ancient Law of Scotland, by President Balfour, fol. 1754.
Bankt.....	Institute of the Laws of Scotland, by Lord Bankton, fol. 1756.
Bell Com.....	Bell's (Professor G. J.) Commentaries on the Laws of Scotland, 5th Ed. 4to. 1826.
— on Rec. Stat.....	Bell's ——— Commentary on Recent Statutes, 4to. 1840.
— Prin.....	Bell's ——— Principles of the Law of Scotland, 4th Ed. 1839.
— Notes.....	Bell's (B. R., Esq. Advocate) a Supplement to Hume's Commentaries on Crimes, 4to, 1844.
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— 8vo Cases.....	— ——— Cases Decided in the Court of Session, Nov. 1790 to July 1792.

- Bell Styles.....Bell's (Robt. W. S.) System of the Forms of Deeds used in Scotland, 2d Ed. 8vo. 1811.
- App.....Cases Decided in the House of Lords on Appeal from Scotland, 1842 to 1848, (current).
- Bev.....Beveridge's (Thos. D. C. S.) Forms of Process in Court of Session, &c. 8vo. 1828.
- Bev. on Bill Chamber....— on Bill Chamber, 8vo. 1828.
- Blackstone .....Blackstone's Commentaries on the Law of England, 21st Ed.
- Bligh .....Cases in House of Lords, 1819-1838, 8vo.
- B. S.....Books of Sederunt.
- Boyd.....Judicial Proceedings before the Court of Admiralty in Scotland, 8vo. 1814.
- Buchanan.....Buchanan's Reports of Remarkable Cases, 1806-1813, 8vo.
- Brodie .....Brodie's Notes on Stair.
- Broun.....Broun's Justiciary Reports, 1844-1846, 8vo.
- Burnett .....Burnett's Criminal Law.
- Burton.....Burton's Law of Bankruptcy, 8vo. 1845.
- Church Styles .....Styles of Writs and Procedure in the Church Courts of Scotland, 8vo. 1838.
- Craig .....Craig *Jus Feudale*, fol. 1732.
- Cr. and St.....Craigie and Stewart's Appeal Cases, 1726-1743.
- D. ....Dunlop, Bell, and Murray, &c. Reports, 1838-1848 (current)
- Dallas.....Dallas' System of Styles, 2d Ed. 4to. 1783.
- Deas and And.....Deas and Anderson's Reports of Cases in the Court of Session, &c. 1829-1831.
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- Elchies.....Lord Elchies' Decisions, 4to, 1813, vol. 1.
- Notes.....Do. Do. vol. 2.
- Ersk.....Erskine's Institutes, Ivory's Edition.
- F.....Faculty Decisions, 8vo. 1825-1841.

- F. C.....Faculty Collection, folio, 1752-1825.
- Fergusson.....Fergusson's Consistorial Law in Scotland, 8vo. 1829.
- Fergusson Dec.....Fergusson's Reports of Recent Decisions in Consistorial Court of Scotland, 8vo, 1817.
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- Fraser.....Fraser on Personal and Domestic Relations, 8vo. 1847.
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- New Form of Process ...New Form of Process before the Court of Session, &c. (often called Watson's Forms), 2d Ed. 8vo. 1799.
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- Philipps.....Philipps' Law of Evidence, 9th Ed. 8vo.  
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 vol. to Morison's Dictionary, 1708-1773.  
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 Principal Clerk of Session.  
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 Thomson.....Thomson on Bills of Exchange, &c. in Scot-  
 land, 2d Ed. 8vo. 1836.  
 Th. Ed.....Thomson's Edition of Acts of the Parlia-  
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 W. and S.....Wilson and Shaw's Appeal Cases, 8vo. 1821-  
 1834.





**PART I.**  
**OF THE COURT OF SESSION, ITS JURISDICTION,**  
**MEMBERS, AND OFFICERS.**

**CHAPTER I.**  
**OF THE INSTITUTION OF THE COURT.**

**SECT. I.—DATE OF INSTITUTION, &c.**

THE Court of Session, or College of Justice,—the supreme civil tribunal of Scotland,—was instituted in the minority of James V. during the regency of the Duke of Albany. The sanction of Pope Clement VII. having been obtained to the raising from the revenues of the church of the sum of ten thousand golden ducats for the payment of the salaries of the judges, by a bull, dated 13 Sept. 1531, (A. S. 1532—1553, &c. Apx. I.) the institution of the court was ratified and confirmed by the Parliament which met at Edinburgh on the 17 May 1532, (1532, c. 2, Th. Ed. ii. 335.)<sup>1</sup> The number of ordinary judges, or Lords of Session, was fourteen, one half churchmen, the other half laymen, with a President. The Chancellor of Scotland was, however, entitled to preside and vote when present, and the King was empowered to appoint three or four of his council as extraordinary Lords, to sit and vote. Authority was given to the crown to make rules and statutes for the ordering of the court, which his Majesty delegated to the Chancellor,

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<sup>1</sup> This act is erroneously enumerated 1537, c. 36—41 in the older editions of the statutes in common use. Sir Ilay Campbell's Pref. to A. S. 1532—1553, &c. p. v.; Ersk. i. 3. 12. &c. &c.

President, and the Lords of Session. The first sederunt of the court was on 27 May 1532 (A. S. 1532—1553, &c. p. 1.) when regulations were made for the dispatch of business. They were ratified and approved of by the King, on 10 June 1532,<sup>1</sup> and subsequently by Parliament 1540, c. 93. (c. 10. Th. Ed. ii. 371). The members of court seem at this time to have consisted of the judges, eight advocates, the writers to the signet, the clerks of court, and the macers. (A. S. 27 May 1532). The institution of the College of Justice was confirmed by the succeeding Pope Paul III. (A. S. 1532—1553, &c. Apx. ii. and iii.) and various privileges and immunities, to be afterwards noticed, were conferred on the members of the court by King James and the Pope.<sup>2</sup> When the King arrived “at his perfite aige of xxv yeris,” the institution of the court was again confirmed, 1540, c. 93, *supra*, and likewise by the subsequent sovereigns, Queen Mary, 1543, c. 1, (c. 7. Th. Ed. ii. 443); King James VI. 1593, c. 174, (c. 24. Th. Ed. iv. 22); 1594, c. 214, (c. 21. Th. Ed. iv. 67); Charles I. 1633, c. 23,

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<sup>1</sup> This Act of Sederunt, and the King's ratification, are inserted in the older editions of the Acts of Parliament in ordinary use, as a statute,—of which indeed they had the force,—subjoined to the act 17 May 1532, (cited in the text) and numbered 1537, c. 42, &c. See Sir Ilay Campbell's Pref. above referred to, and Mr. Thomson's edition of the statutes, ii. Pref. p. xiv.

<sup>2</sup> The papal bulls and relative documents are not a little curious. They are remarkable for their verbosity and the anxious regulations they contain for enforcing payment of the revenues appropriated to the support of the new court. It was subsequently agreed that a less sum than ten thousand golden ducats should be levied for this purpose. In those instruments the term ‘College of Justice’ is frequently applied to the newly-instituted Court, and the judges are repeatedly styled the President and Senators of the College. We have here the origin of those titles, which Mr. Erskine (i. 3. 12.) and some of our writers have looked for in other quarters.

(Th. Ed. v. 41); Charles II. 1661, c. 23, (c. 260. Th. Ed. vii. 240). The Treaty of Union, article 19, (Th. Ed. xi. 451), declares that the College of Justice shall in all time coming remain within Scotland, with the same authority and privileges, as before the Union, subject to such regulations, for the better administration of justice, as shall be made by the Parliament of Great Britain.

#### SECT. II.—ALTERATIONS ON ITS CONSTITUTION.

This Court has now subsisted for upwards of 300 years, with little alteration in its constitution; and it is only within the last forty years that any material variations have taken place. The first considerable change was made by the 48 Geo. III. c. 151, (4 July 1808), by which the judges were required to sit in two divisions, instead of the whole fifteen sitting in one court, as formerly; the next, by the creation of a separate but dependent court, for trial of matters of fact by jury, 55 Geo. III. c. 42, (2 May 1815), and 59 Geo. III. c. 35, (19 May 1819); and the third, by the 1 Wm. IV. c. 69, (23 July 1830), by which the Admiralty, Commissary, and Jury Courts were abolished, their jurisdiction transferred to this court, and the judges reduced to thirteen. The provisions of this statute, § 20, and of the 6 Geo. IV. c. 120, § 1. (*Judic. Act*, 5 July 1825) having now come into operation, the Court of Session consists of the Lord President,<sup>1</sup> Lord

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<sup>1</sup> The office of Lord Justice General, the head of the criminal judicatories of Scotland, has now, in terms of the said statute of Wm. IV. (§ 18,) devolved upon and remains united with the office of the Lord President of the Court of Session. The Queen's letter, appointing Lord Justice Clerk Boyle to be "Lord Justice General and President of the Court of Session in Scotland, to have, hold, and exercise the said united office, with all salaries, privileges, &c.," is engrossed in the books of sederunt under the date 7 Oct. 1841. He was accordingly, of that date,

Justice Clerk, and eleven ordinary Lords. The Lord President, and three ordinary Lords, form the First Division, and the Lord Justice Clerk, and other three ordinary Lords, the Second. There are five permanent<sup>1</sup> Lords Ordinary, who are now generally on the same footing in regard to the duties of preparing and deciding causes in the Outer-House, except that the last appointed of them, who is named the Junior Lord Ordinary, in addition officiates on the Bills (*infra*, P. iii. 12. 1.) during Session, and performs certain other duties which are appropriated to that judge. He is now relieved of the Teind causes and proceedings, which were formerly under his charge. The duties of this department are performed by the second Junior Lord Ordinary for the time being. 1 and 2 Vict. c. 118, (16 Aug. 1838) §§ 1. 2. 3. See *infra*, P. i. 3. A. 8.

#### SECT. III.—DIMINUTION OF BUSINESS OF COURT.

The business of the Court of Session has diminished rapidly during the last half century, although in that period the population of the country has increased at least one half, and its commerce, wealth, and the number of transactions,

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"admitted Lord Justice General and constant President of the College of Justice, by the title of Lord Shewalton."—*Ibid.* Regarding the Lord Justice General, or "Justiciar" of Scotland, an officer of great antiquity and dignity, see Thomson's Acts, v. i. *voce* "Justiciar;" Stair iv. 1. 4; Ersk. i. 3. 24.

<sup>1</sup> The system of *permanent* Lords Ordinary in the Outer-House was first introduced by the statute 50 Geo. III. c. 112, (20 June 1810), § 29, and has been since continued, with various modifications in details. Prior to that period, each of the Lords in rotation, with the exception of the Lord President, sat alternately, for the space of a week, doing duty in the Outer-House and on the Bills, as judge, in the first instance, in all cases coming into court during his week, until they were finally disposed of in the Outer-House.

in a still greater ratio. The cases enrolled in the Outer-House Rolls averaged for the four years preceding 1798, 2631 annually; for the four years previous to 1810, when the fee fund was imposed, 2594; for the four years after, 2374. This was an annual average decrease of 220 cases. The average of the four years before the judicature act of 1825 came into operation, was 2143, and for the four years afterwards, only 1998, giving an annual average of no less than 791 fewer than the year ending 11 July 1794, when 2789 cases were enrolled. Notwithstanding the abolition of the Commissary and Admiralty Courts, which occasioned an influx of business into the Court of Session, the whole number of cases enrolled in the Outer-House Rolls in the year 1831, amounted to only 1956. The number has still farther diminished. The causes enrolled between 1 Jan. 1843 and 1 Jan. 1844, were 1526, and between 1 Jan. 1846, and 1 Jan. 1847, 1385—Parliamentary Returns under 1 Wm. IV. c. 69, (23 July 1830) § 10. During the year 1846, there were extracted 663 decrees in absence; 372 decrees *in foro*; and 288 acts. Report by Junior Principal Clerk as to Extracting Department, 24 Feb. 1847; Books of Sed. (unprinted). But it ought to be noticed, that by certain late statutes, election proceedings in regard to freeholders, which occasioned much litigation, have been placed under the exclusive jurisdiction of the sheriffs, and that those judges have also been made competent to decide actions of *cessio bonorum* and causes relative to nuisance and servitudes. Questions arising in sequestrations, which formerly could alone be discussed before the Court of Session, and which frequently gave rise to much litigation, are also now discussed before sheriffs in the first instance. In this way, some of the most fruitful sources of litigation, which contributed to swell the rolls of the Court of Session, have been removed to or made competent before other Courts.

## CHAPTER II.

## OF THE JURISDICTION OF THE COURT OF SESSION.

## SECT. I.—TRIFLING CASES EXCLUDED.

THIS court, as the supreme civil tribunal of the kingdom, has necessarily a very extensive jurisdiction, partly conferred at its original institution, and partly acquired since by statute or custom. The court was authorized "to sitt and decyde upon all actionns civile," 1537, c. 36, (17 May 1532, c. 2, Th. Ed. ii. 335);<sup>1</sup> and, at first, all claims, of whatever nature or amount, and whoever were the debtors or creditors, might competently have been pursued in it, except, perhaps, claims for the king's revenues, the proper court for the recovery of these being the Exchequer. The statute 1663, c. 9, (c. 3, Th. Ed. vii. 451), however, prohibited advocacy from inferior judges, where the sum in dispute was under 200 merks, a prohibition which was afterwards extended to sums under £12 sterling, 20 Geo. II. c. 43, (*Herit. jurisd. Act*—1747), § 34; and, in order to prevent the time of the court being wasted with trifling causes, it was declared, by 1672, c. 16, (c. 40, "*Act concerning the Judicatories*," Th. Ed. viii. 83) § 16, "that all causis not exceeding the value of 200 merks Scots, be in the first instance caried on befor the inferior judges, and that noe summonds be raised upon bill, or otherways, for causis of less importance," "except there be such reasons condiscended on in the bill, as would be sufficient to procure ane advocacy of the cause from the inferior judge, in behalfe of a defender, and compitent instructions thereof, and that such bill doe

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<sup>1</sup> See *supra*, p. 1, Note.

not pass of course, bot be specially presented and red to the Ordinarie; and that the deliverance on the back thereof beir, *Because the Lords have found sufficient ground for which the case aught not, in the first instance, to be pursued before the inferior judge ordinarie, bot before the Lords;* excepting, also, the causis belonging to the members of the colledge of justice, and except soums due to merchants, cuiks, vintners, and others in burgh, for furniture taken off from them by such as dwell not within the shire where the furniture was taken off." The statute 50 Geo. III. c. 112, (20 June 1810), § 28, enacts, "that all causes, not exceeding the value of £25, shall, from and after the passing of this act, be carried on, in the first instance, before the inferior judges in the manner directed, and with the exceptions specified" in the act 1672. A provision of the same kind is contained in the act, transferring the jurisdiction of the Court of Admiralty to the Court of Session, 1 Wm. IV. c. 69, (23 July 1830,) § 21. *Infra*, Sect. III.

SECT. II.—TRIFLING CASES, IN SOME INSTANCES,  
RECEIVED.

The exceptions alluded to in last section have led to some discussion. It appears that, even prior to the institution of the College of Justice, the causes of foreigners were entitled to be heard in the supreme court, 1487, c. 105, (c. 10. Th. Ed. ii. 177); and, when the present court was instituted, the same rule was continued; for Friday, weekly, was assigned for the "kingis maters, and the maters of strangers," 1537, c. 45, (A. S. 27 May 1532).<sup>1</sup> It is therefore now settled, that a foreigner, or Englishman, not resident in Scotland, cannot be pursued for an ordinary personal claim of debt before an inferior court, such as the Sheriff Court, except he have fixed a domicile within the inferior jurisdiction, as *e. g.* under

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<sup>1</sup> See *supra*, p. 2, Note 1.



an application against him, as in *med. fugæ*; and although such a court has sufficient jurisdiction to attach his funds within its territory, *jurisdictionis fundandæ causa*, yet the action must, in the ordinary case, be pursued before the supreme court, *Hardie v. Liddel*, 4 Jan. 1759, M. 4830; *Burn and Mandy. v. Purvis and Mandy*. 13 Dec. 1828, vii. S. 194; *White v. Spottiswoode*, 30 June 1846, viii. D. 952. In this sense, the rule, that the Court of Session is the *commune forum* of all who reside abroad, is to be understood, Ersk. i. 2. 18; Prins. i. 2. 11; for, where one is arrested on a border warrant,<sup>1</sup> he is bound to answer in the court of the inferior judge by whose authority he is arrested, as he will not be liberated until he finds caution to answer in the inferior court, and the bond of caution appoints a domicile where he may be cited. If he remain in jail, again, he will be cited personally. *Potts and Hunter v. Mitchelson and Robson*, 20 July 1705, M. 4828. And it seems to have been assumed, that the Englishman must answer in the inferior court, although his effects only be arrested on a border warrant, *Hardie*, supra. In real actions, where the sheriff has a privative jurisdiction, as in actions for straightening marches, building march dikes, &c., a stranger must answer before the sheriff, and the Court of Session will grant letters of supplement for citing him edictally, *Williamson v. Haigie*, 28 Nov. 1635, M. 4815; Ersk. i. 2. 17. Letters of supplement which were formerly required, where the party to be called was out of the inferior judges' territory, may be now dispensed with,—if the parties to be cited are within Scotland, and amenable to the jurisdiction of the sheriff. By 1 and 2 Vict. c. 119, (16 Aug. 1838,) § 24, it is enacted, on the recital, that “it is expedient to authorize citation to sheriff courts of persons in Scotland without the necessity of having recourse to letters of supplement from the Court of Session;”—

<sup>1</sup> In the case of *Landell v. Landell*, Jan. 26, 1838, xvi. S. 388, and the subsequent judicial proceedings which arose out of it, (6 Mar. 1841, iii. D. 819), much information regarding this peculiar species of warrant will be found.

that it shall be competent to cite all persons within Scotland, as parties in any civil or criminal action or proceeding in any sheriff court, who may be amenable to the jurisdiction of such court, in respect of such action or proceeding, by the warrant of such sheriff court; and it shall also be competent to cite witnesses and havers within Scotland in any civil or criminal action or proceeding in any such courts by the warrant of such courts; and all such warrants shall have the same force and effect in any other sheriffdom as in that in which they were originally issued, the same being first endorsed by the sheriff-clerk of such other sheriffdom, who is hereby required to make and date such endorsement; and such citation duly made shall be deemed to be due and regular citation." A Scotchman who is forth of Scotland *animo remanendi*, is in the same situation as a foreigner in this question, for it is now settled that the *forum originis* gives no jurisdiction *per se*, *A. v. B.* 28 Nov. 1754, v. Sup. 278, and 820; *Ross v. Maxwells*, 11 Dec. 1754, M. 11,994; *Denholm v. Johnston*, 9 Jan. 1674, M. 7485; *Pedie v. Grant*, 14 June 1822, as reversed, on appeal, 5 July 1825, 1 W. & S. 716; *Harvey, Hall and Co. v. Black and Son*, 21 June 1831, ix. S. 785. See farther on this subject, *infra*, P. ii. 1. 8.

Where a creditor has various debtors in different shires, conjunctly or severally bound to him, or when he wishes to prosecute in one action persons jointly bound to him, as executors, he must raise his action before the Court of Session, however small the sum may be, for it is incompetent for that court, by letters of supplement, to extend the jurisdiction of an inferior judge beyond his territory, *Blackwood v. Halliday*, Jan. 1731, M. 8237; *M<sup>c</sup>Eachern v. M<sup>c</sup>Pherson and M<sup>c</sup>Lachlan*, 3 July 1824, iii. S. 211, (N. E. 150); *Reid v. Turner*, 23 June 1830, viii. S. 960. It has, however, been found, that the trustees of a party deceased may be sued within the shire where he was owner of heritable subjects

in which he carried on a manufacture, and where the managing trustee resided, the others being called by letters of supplement, *Black, &c. v. Duncan*, 18 Dec. 1827, vi. S. 261. In another case, the circumstances of the subject claimed, (title-deeds,) and the defender's place of business, where the deeds were delivered to him, being within the territory, were held to give the inferior court a jurisdiction, though the defender resided, and the property was situated, elsewhere, *Ritchie v. Wilson*, 15 Feb. 1828, vi. S. 552; see also *Bannatyne v. Newendorff, &c.* 22 Jan. 1841, iii. D. 429. On the same ground, where, during the dependence of an action before an inferior court, the defender dies, and his representatives are living out of the kingdom, the case can proceed only in the supreme court. An action of transference must be raised in that court against the representatives, and the original cause advocated from the sheriff for defect of jurisdiction, *Ross v. Maxwells*, 11 Dec. 1754, M. 11,994. See *infra*, P. iv. 1.

Summonses for claims under £25, against strangers or debtors in different shires, must proceed on a bill, which is signed by the clerk of the bills only, as authorized by 53 Geo. III. c. 64, (3 June 1813), § 17; for this act empowers him to sign all bills, formerly denominated Plack Bills, (from the amount of the clerk's dues), and including all the bills presented at the Bill-Chamber, excepting those of Advocation and Suspension. Where he has any doubt, he reports the matter to the Ordinary, whose signature is then necessary. It is not the practice, at present, to write the long deliverance required by the act 1672, *supra*, Sect. i. p. 7; and, in this respect, the directions given in the last edition of the Juridical Styles, v. iii. 972, are erroneous.

Causes of members of the College of Justice do not require a bill; and such parties may at once sue as they may be sued in this court for sums under £25, *Jamieson, Petr.*, 21 Feb. 1815, F. C.; *Bruce v. Clyne*, 24 Jan. 1833, xi. S. 313. This privilege holds equally, whether the action commence

by a summons, or by a summary application ; and, although a sheriff may grant an interdict against a member, the merits of the case must be tried in the Supreme Court, *Macdonald, &c. v. Mackintosh, &c.* 12 Feb. 1831, ix. S. 429. It was once attempted, but unsuccessfully, to maintain, that a member lost his privileges by residing in the Abbey, to avoid the diligence of his creditors, *Anstruther v. Gordon*, 11 Jan. 1710, M. 2414. A member of the College of Justice, who is an onerous assignee of a party, not a member, may pursue for recovery of a claim under £25, *Mackintosh v. Brodie*, 17 June 1826, iv. S. 729, (N. E. 736). See *Kay v. Begg and Balfour*, 26 Jan. 1837, xv. S. 422 ; but if he does not hold the debt in his own right, but is liable to account for it, the action is incompetent, *Brown v. Turner*, 9 Feb. 1827, v. S. 321, (N. E. 298). The representatives of a member of the College of Justice are not entitled to raise an action for a business account under £25, due the deceased, *Smyth, &c. v. Cunningham*, 14 Nov. 1832, xi. S. 8. A privileged party will not be allowed to plead the incompetency of an action against him in the Court of Session as being for a sum under £25, by merely waiving in that suit any privilege competent to him, while he does not disclaim being entitled to the privileges of a member of the College, *Bruce v. Clyne*, *supra*. See farther, *Macneil v. Douglas*, 1 Mar. 1836, xiv. S. 588. The exemption of members of the College of Justice from the jurisdiction of the inferior courts, must be there pleaded, *Laidlaw v. Wyld*, 9 June 1801, F. C., M. Apx. Arrest. No. 4.<sup>1</sup> Many questions

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<sup>1</sup> Members of the College of Justice are not exempted from the jurisdiction of the Small Debt Acts, 6 Geo. IV. c. 48, (22 June 1825—*Justices*) ; 7 W. IV. and 1 Vict. c. 41, (12th July 1837—*Sheriffs*) ; nor from that of the sheriff courts, in the summary removings authorized by 1 and 2 Vict. c. 119, (16 Aug. 1838), § 8, &c. See *infra*, P. I. 6. 6.

have arisen, whether actions were to be held as for sums under or above £25. The rule is, that the competency of an action must be judged of from the conclusions, *Gifford, &c. v. Trail, &c.* 8 July 1829, vii. S. 854; Lord President Hope's Speech, p. 859. This is in accordance with a principle long recognised in Scotland, that *conclusio libelli maxime est inspicienda*.—Balf. 313. If the demand made in the conclusion, exceeds £25, it must be entertained, *M'Ewan v. Davies, &c.* 12 Feb. 1824, ii. S. 696, (N. E. 584). This is a strong case, as the whole debt, except £4. 14s., had been paid, before the action was raised; *Taylor v. Purves*, 17 Nov. 1824, iii. S. 286, (N. E. 201). In a later case, *Allan v. Glover*, 9 July 1828, vi. S. 1106, a different view was taken, and it having appeared that the defender had a counter claim, which reduced the debt below £25, the action was dismissed, as the balance had been tendered before the action was raised. But the prior authorities do not seem to have been brought before the Court; and, in the later case of *Young and Co. v. Hutchison*, 13 June 1832, x. S. 643, the rule above stated was given effect to, although the defender admitted the whole claim £29 odds, except the sum of £4. 16s. 8d. See also *Bell, &c. v. Allan and Son*, 19 June 1838, xvi. S. 1169. It is incompetent for one to pursue an action in this court for two debts, each under £25, due by the same debtor, where one of them has been assigned by the one creditor to the other, without value, *Gibson, Thomson and Co. v. Cameron*, 9 June 1827, v. S. 784, (N. E. 731).

The conclusions of the summons are also the proper rule in judging whether an advocacy be competent, (*supra*, Sect. i. p. 7.) even although the Sheriff may have found the advocator liable in a sum under £12, *Ewing v. Hare*, 27 Nov. 1822, ii. S. 47; see *infra*, P. iii. 12, 1. The same point having occurred as to the competency of an appeal to the Circuit court, it was decided the same way, *Davidson and Co. v.*

*Mackie*, 10 Dec. 1822, ii. S. 76, (N. E. 70). See also in the same court, *Lamb v. Henderson*, 4 Oct. 1844; Broun ii. 311; *Wilson v. Addison*, 11 Oct. 1845, *ibid.* 519; *Giffen v. Orr*, 19 Nov. 1824, iii. S. 301, (N. E. 212); *Stott v. Gray*, 26 June 1834, xii. S. 828. Cases may occur of such specialty, that advocacy may be sustained, though the subject in dispute be apparently of less pecuniary value than £12. Thus, where an action concluded for the restitution of two queys, or to repay the price, being £11. 8s., an objection to an advocacy was repelled, as the value of two queys might exceed £12. *Cooper v. Bone and Black*, 18 Dec. 1823, ii. S. 598, (N. E. 511). *Hunter v. Anderson*, 19 Jan. 1831, ix. S. 289. The rule prohibiting the receiving of advocations of actions for sums under £12 is attended with no benefit, for it is now settled, that decrees in such cases may be suspended even before extract, contrary to the rule in cases above £12, *Turner v. Gray*, 9 July 1824, iii. S. 235, (N. E. 165). See *infra*, P. iii. 12, 1, and 4. And thus, instead of preventing litigation in trifling cases, which was the ground of the regulation, it has only changed the form of proceeding, *Galletly v. Child*, 15 June 1824, iii. S. 142, (N. E. 95). *Swan v. Craig*, 17 May 1825, iv. S. 11, (N. E. 12). As the statute declares, that advocations for sums under £12 are not to be received, it is incompetent to remit with instructions, *Buchanan v. Ure*, 26 July 1750, M. 12,243. It will be observed, however, that, speaking generally, with the exception of cases decided by the justices and sheriffs under the small debt acts, and with some other statutory exceptions, cases of the most trifling amount may still be brought before the Court of Session by suspension. But when questions of a trifling nature are brought in the first instance before this court, they are sometimes dismissed with expenses, as being fitter for the cognizance of the Judge Ordinary than of a supreme

court, *Neilson v. Waterstone*, 1 Mar. 1823, ii. S. 259, (N. E. 228).

SECT. III.—JURISDICTION EXTENDED TO ADMIRALTY AND  
CONSISTORIAL CASES.

In general all actions of a civil nature, which statute or long practice has not confined to other courts, are competent in the Court of Session. Many questions formerly arose as to whether cases ought to be brought into the Court of Session or the Commissary or Admiralty Courts, but the statute 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830) § 21, abolished the High Court of Admiralty, and declared, "that the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings, of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty, before the passing of this act, and all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills; provided always that all such causes not exceeding the value of £25 sterling shall be instituted and carried on, in the first instance, before an inferior court, in the manner directed, and with the exceptions specified," in the act 1672. (*Supra*, Sect. i. p. 6). This statute farther declared, § 33, "that all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro*, shall be competent to be brought and insisted on (in) only before the Court of Session." By § 31, the jurisdiction of the Commissary Court of Edinburgh was reduced to that possessed and exercised by sheriffs being commissaries in other sheriffdoms of Scotland, with the exception of the confirmation of testaments of parties dying abroad, which jurisdiction was reserved to said court. It would farther appear, that,

as there is no other competent tribunal, actions of declarator of freedom and putting to silence must be pursued before the Court of Session. See Fraser, i. 710. Actions of adherence, "where the same shall have a connection with the lawfulness of marriage, or adultery," are in the same situation; "but when the adherence is pursued upon the account of malicious desertion only, and when there is no question of the nullity or lawfulness of the marriage, the inferior commissaries may decide," Reg. 1666, c. ii. (A. S. v. i. p. 95). The jurisdiction of the inferior commissaries was transferred to the sheriffs, 4 Geo. IV. c. 97, (19 July 1823) § 6. Doubts have been expressed how far the Court of Session has any jurisdiction in actions of adherence, as such actions are not expressly mentioned in the statute of William as competent in that court; but, it will be observed, that, unless in the case of those actions of adherence which can be pursued before the sheriffs as inferior commissaries, there is no other competent tribunal than the Court of Session for such cases, as the jurisdiction of the commissaries of Edinburgh was expressly declared to be not more extensive than that of sheriffs as inferior commissaries, 11 Geo. IV. and 1 Wm. IV. c. 69, § 31; and by statute 6 and 7 Wm. IV. c. 41. (28 July 1836), the remaining jurisdiction of the Commissary Court of Edinburgh was abolished, and its powers generally transferred to the Sheriff of Edinburgh.

In *Morrison v. Munnoch*, 11 July 1837, xv. S. 1293, the question arose under § 21. of the act, whether a maritime debt, under £25, contracted by a party domiciled in England to a merchant in Leith, could be sued for in the Court of Session upon an arrestment *jurisd. fund. causa*.

It was unfortunate, that, in transferring the jurisdiction of the Court of Admiralty and of the Commissaries to the Court of Session, the distinctions between the actions formerly peculiar to those courts and the causes always compe-



tent to the Court of Session, should have been kept up. But this was effectually done by § 40 of the 11 Geo. IV. and 1 Wm. IV., which required summonses in maritime and consistorial causes to be signed by a principal or depute clerk of session, and declared it unnecessary that they should pass the signet, while all other summonses must be signeted. It therefore continued necessary to consider accurately the nature of a summons to decide the question, whether it should be signeted or not, in the same manner as when the Admiralty and Commissary Courts had a privative jurisdiction in a certain kind of cases. Thus, a declarator of bastardy, if raised by a donator of the bastard's escheat after his death, must be signeted, but if raised during his lifetime it must be signed by a clerk, Ersk. i. 5. 29. So an action for the price of repairs and furnishings to a ship was held to be a maritime cause, and the summons having passed the signet, and not having been signed by a clerk of session, was dismissed as incompetent, *Gavin and Son v. Sword*, &c. 19 Dec. 1835, xiv. S. 187. So far as admiralty proceedings are concerned, a remedy was applied by 1 and 2 Vict. c. 118. (16 Aug. 1838), § 29, which declares that "Summonses in admiralty causes may be raised and pass under the signet, in like manner as other summonses before the Court of Session now do." But in consistorial cases the rule still exists in all its stringency; *Buxton v. Buxton*, 16 Jan. 1845, vii. D. 1063. The same distinction was unnecessarily kept up by the act transferring the jurisdiction of the inferior commissaries to the sheriffs, (4 Geo. IV. *supra*) for consistorial actions raised before a sheriff as sheriff, and not as commissary, seem null. *Braick v. Forbes or Braick*, 19 Dec. 1829, viii. S. 284. See further on the subject of this section, *infra*, P. iii. 11, where the procedure in Admiralty and Consistorial Causes is stated.

## SECT. IV.—PRIVATIVE JURISDICTION OF COURT.

In a variety of cases this court has a privative jurisdiction, as in the above causes transferred from the Commissary Court, in competitions relative to heritable property, and declarators of the right to it, *Girvan v. Smith*, 3 Dec. 1829, viii. S. 173. Many cases have occurred partaking more or less of the nature of these latter classes of actions, in which the competency of insisting in the inferior courts has been discussed, *Gordon, Petr.*, 6 Feb. 1802, M. 12,245; *E. of Aberdeen, &c. v. Laird*, 7 Feb. 1822, i. S. 325, (N. E. 273), *Bridges v. Elder*, 5 Mar. 1822, i. S. 417, (N. E. 351); *Wight v. Wilson*, 27 Nov. 1827, vi. S. 132; *Magistrates of Dunbar v. Sawyers*, 28 May 1829, vii. S. 672; *Thomson, &c. v. Donald*, 4 Mar. 1830, viii. S. 630; *E. of Moray v. Pearson, &c.*, 11 June 1842, iv. D. 1411. By 1 and 2 Vict. c. 119, (16 Aug. 1838), § 15, the jurisdiction of the sheriffs is extended to all actions or proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or prædial servitudes; and it is declared that all parties against whom such actions or proceedings may be brought, shall be amenable to the jurisdiction of the sheriff of the territory within which such property or servitude shall be situated. See *Brown, &c. v. Currie and Jardine*, 1 Feb. 1843, v. D. 463. Actions of declarator are also confined to the Court of Session; as of nullity of right, *A. v. B.* Nov. 1618, M. 7407; of failure in a contract, or in regard to modification of penalties, *Gray, &c. v. Whytebank*, 7 July 1649, i. Sup. 410; 54 Geo. III. c. 137, (*former bankrupt act*, 25 July 1814), § 9; declarator of non-entry, 14 June 1665, M. 7408; proving of the tenor of deeds, *Lord Balnagoun v. M'Kenzie*, 28 Jan. 1663, M. 545, and 7408; *Carson v.*

*M'Michen, &c.*, 14 May 1811, F. C.; extraordinary removing, *Bethune*, 22 Dec. 1681, M. 7307 and 7409; *Laird Jerviswood v. Laird Livingston*, 23 Feb. 1632, M. 7408; but an action of removing, founded on the irritancy contained in a lease, may be pursued in an inferior court, though in some measure in the form of a declarator. See *infra*, P. iv. 3. 1; fraudulent bankruptcy, *Lord Advocate v. Duncan*, 21 Jan. 1823, ii. S. 132, (N. E. 123); but the Court of Justiciary has now jurisdiction in this crime, 7 and 8 Geo. IV. c. 20, (28 May 1827), *infra*, P. ii. 1. 16; actions of cognition and sale; the king's actions, *A. v. B.* 16 July 1534, M. 7321; 1537, c. 45, (i. e. A. S. 27 May, 1532);<sup>1</sup> reductions of decrees and of deeds, and all other rescissory actions; but an inferior court may competently ordain a person who has got, and is in possession of bills, by an illegal agreement, to deliver them up, *Riddle v. Christie*, 20 Nov. 1821, i. S. 151, (N. E. 145); and in an action before a sheriff, an heritable bond may be restricted to a sum below its specified amount, on evidence that no more is due, *Chalmers v. Roxburgh*, 18 May 1825, iv. S. 12, (N. E. 13). A declarator of forfeiture of a right, or for the cancelling of documents, is also incompetent in an inferior court, *Young v. O'Rourk*, 25 May 1826, iv. S. 617, (N. E. 625). Farther, actions of reduction for the restitution of minors, are only competent in the supreme court; and inferior courts have no jurisdiction to try the right of a party to be admitted a member of a corporation, *Fleishers of Glasgow v. Watson*, 20 Nov. 1824, iii. S. 305, (N. E. 215); the Court of Session is alone competent in cases where no inferior judge has jurisdiction, as when the magistrates of a royal burgh, having a right of sheriffship within itself, must be pursued as magistrates, *Wilson v. Town of Perth*, 26 Jan. 1670, M. 7409. Under the former sequestration act it was held in a depend-

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<sup>1</sup> See *supra*, p. 2, Note 1.

ing sequestration, that an action could not be competently raised before an inferior court against a trustee, for payment of a dividend, *Mitchells v. Mein*, 7 July 1829, vii. S. 841. But by the later Bankrupt act, 2 and 3 Vict. c. 41, (17 Aug. 1839) a very extensive jurisdiction, under review of the Court of Session, is conferred upon sheriffs in sequestrations. See particularly §§ 27 and 105, with reference to such a demand as the one in the case just quoted; *Infra* P. v. 16. But where an action in the supreme court has been terminated by an agreement, an action founded on the agreement may competently be raised in an inferior court, *M'Michael v. Baird*, 24 Feb. 1827, v. S. 467, (N. E. 440). The privative jurisdiction of the Court of Session in actions of *cessio bonorum* was abolished by 6 and 7 Wm. IV. c. 56, (13 Aug. 1836). They are now also competent in the sheriff courts. *Infra* P. v. 4.

Actions of permanent aliment between parent and child, being founded on equity, were at common law competent to this court alone, *Jackson v. Jackson*, 3 Mar. 1825, iii. S. 610, (N. E. 429). See also *Braick v. Forbes or Braick*, 19 Dec. 1829, viii. S. 284. But actions of aliment generally are now competent in the sheriff courts, it being declared by 1 Wm. IV. c. 69, (23 July 1830), § 32, "that actions of aliment may be instituted, heard, and determined, in any sheriff court of Scotland." Before the statute just quoted, the court had no jurisdiction in the first instance, in questions of aliment, at a wife's instance against her husband, even when her status was not disputed, *Wylie v. Hamilton*, 8 July 1824, iii. S. 231, (N. E. 162); *Grahame v. Grahame*, 3 June 1826, iv. S. 670, (N. E. 677), but such actions are now competent in the supreme court, as well as before the sheriffs as inferior commissaries, *Ersk. i. 5. 30 and 31. Supra*, Sect. iii.

## SECT. V.—STATUTORY JURISDICTION.

The jurisdiction of this court has been much extended by statute, and a variety of cases appropriated to it, as,—actions of ranking and sale,—adjudications, with certain limited exceptions,—division of commonities,—sequestration of bankrupts, though the details of proceedings in bankruptcy now go on before the sheriff under the review of the court,—questions relative to infestments, though confirmed in Parliament, 1567, c. 18, (c. 22, Th. Ed. iii. 29),—admiralty and consistorial actions, *supra*, Sect. iii., and several other cases.

## SECT. VI.—JURISDICTION AS A COURT OF REVIEW.

As a Court of Review, the Session has also a very extensive jurisdiction; which is not confined to cases competent to it in the first instance, but also extends to most other civil causes, not excluded by statute. Thus, although briefes for the service of tutors at law, briefes of terce, of idiotry and furiosity, can only be directed to inferior judges in the first instance, all the proceedings in these services may be reviewed by the Court of Session. It may even review not only final, but interlocutory judgments of inferior courts; but the grounds upon which advocations from interlocutory judgments are now allowed, are limited, 1st, To incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party; 2d, Contingency; 3d, Legal objection, with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for a partial payment,—provided that, in the cases specified under the third head, leave be given by the inferior judge. 50 Geo. III. c. 112, (20 June 1810), § 36.

“ In all cases originating in the inferior courts, in which the claim is in amount above £40, as soon as an order or an

interlocutor allowing a proof has been pronounced in the inferior courts, (unless it be an interlocutor to allow a proof to lie *in retentis*, or granting diligence for the recovery or production of papers), it shall be competent to either of the parties, (or) who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by bill of advocation, which shall be passed at once, without discussion and without caution."—6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 40; see *infra*, P. iii. 12. 1, 2, 3.

In cases where no provision has been made for the review of the proceedings of an inferior court, or parliamentary commission, still those proceedings are subject to the control of the supreme court, where that court has previously had a jurisdiction; and, therefore, before the introduction of the new system of providing for the poor by the statute 8 and 9 Vict. c. 83, (4 Aug. 1845), the proceedings of kirk sessions and heritors, in the management of the poor's funds, were reviewable by this court, *Higgins v. Heritors and K. S. of Barony parish of Glasgow*, 9 July 1824, iii. S. 239, (N. E. 168); *Guthrie, &c. v. Miller*, 25 May 1827, v. S. 711, (N. E. 663). *Pryde or Duncan v. Heritors and K. S. of Ceres*, 14 Feb. 1843, v. D. 552. Neither is this right of review to be taken away by implication; for all new and particular jurisdictions derogating from the jurisdiction of the supreme court, are to be taken strictly, Ersk. i. 2. 7. Thus, although a statute may authorize an inferior court "finally to determine and adjudge," the judgment may, notwithstanding, be reviewed, *Buchanan v. Towart*, 10 Mar. 1754, M. 7347; *Magistrates of Perth v. Queensferry Road Trustees*, 15 Jan. 1756, v. Sup. 318. The same remark is true, even where additional expressions are used, *e. g.* that the judgment "shall not be removeable by *certiorari* into any court whatever," *Guthrie, &c. v. Cowan*, 10 Dec. 1807, M. Apx. Juris., No 17. The meaning of such expressions merely is

that the cause shall not be removed from the inferior court, until it is finally determined. At least, this seems the proper interpretation, where the court had a jurisdiction before the statute creating the inferior tribunal, or giving it jurisdiction, was passed. On the same principle, the ordinary form of process is not easily to be excluded. Thus, where an act permits application to be made to the Court of Session for redress by summary complaint, this permission does not exclude an application for review by advocacy, *Mitchell v. Morrison*, 21 Jan. 1832, x. S. 230. But, if the supreme court had no jurisdiction previously, it might probably be different, *Alexander v. Seymour*, 2 Dec. 1828, vii. S. 117; and it has accordingly been found, that the court cannot review the sentences of the justices in questions under the friendly society acts, *Cooper v. Bertram Shotts Friendly Society*, 11 Mar. 1825, iii. S. 648, (N. E. 454); *Lindsay, &c. v. Orr*, 11 Feb. 1831, ix. S. 426; *Lang v. Craig, &c.* 21 Feb. 1833, xi. S. 424; nor, except in cases of gross excess of power, the proceedings of the courts of lieutenantcy, acting under the statutes relating to the militia, *Chivas v. D. of Gordon*, 11 July 1804, M. Apx. Juris. No. 12; *Imray, &c. v. Deputy Lieutenants of Inverness-shire*, 2 March 1811, F. C., or comprehending act, *Patillo v. Maxwell, &c.*, 25 June 1779, M. 7386; nor will it interfere with the orders of the Lords of the Admiralty given to the commanders of ships of war, in regard to the detention of foreign seamen, *Boyesen, &c. v. Nixon, &c.*, 16 Jan. 1813, F. C. The court cannot review the decision of the sheriff, under the general road acts, *Merry v. Dallas and Henderson*, 29 Nov. 1828, vii. S. 90; *Simpson v. Harley*, 25 June 1830, viii. S. 977; *Wilson v. Leith Walk Trs.*, 11 June 1831, ix. S. 725; *Neilson v. Thompson*, 9 Mar. 1832, x. S. 466; *Lang and Martin v. Gourlay & Co.*, 12 June 1834, xii. S. 719; nor of the justices under the post horse acts, *Mair v. Mill*, 7 June 1822, i. S. 473, (N. E. 440); *Campbell v. Mill*,

28 June 1823, ii. S. 440, (N. E. 392); *Craigie v. Mill*, 11 Feb. 1826, iv. S. 447, (N. E. 453); Aff. 25 June 1827, ii. W. & S. 642. Where a statute also lays down a certain form of imposing penalties, as by conviction before a justice of the peace, the Court of Session cannot, in reviewing the judgment, convict and find offenders liable, for there must be a conviction by the justices, *Mitchell v. Morrison, &c.*, 21 Jan. 1832, x. S. 230.

SECT. VII.—TO CONTROL PROCEEDINGS IN INFERIOR  
COURTS.

Even in cases where the power of review is plainly excluded, the Session, as the supreme civil court of the kingdom, must still necessarily have jurisdiction to examine whether the inferior tribunals proceed according to the regulations of the statutes conferring the jurisdiction, and according to the ordinary principles of the common law. The supreme court will, therefore, interfere in all cases where there has been a flagrant deviation from the statutory directions, or excess of power; *Guthrie, &c. v. Miller*, 25 May 1827, v. S. 711, (N. E. 663); *Mair v. Mill*, 7 June 1822, i. S. 473, (N. E. 440); *Key v. Stirling, &c. Road Trustees*, 11 Dec. 1830, ix. S. 167; such as assuming a jurisdiction over persons beyond their territory, or otherwise; *Scott, &c. v. Anderson*, 24 Nov. 1830, ix. S. 65; where any thing enjoined by the statute has been omitted, *Young v. Milne, &c.* 28 June 1814, F. C.; *Burnet v. Knowles*, 5 July 1815, iii. Dow, 280; *Campbell v. Anderson and Co.*, 16 Mar. 1818, v. Dow, 412; *Grant v. Gordon, &c.*, 5 Dec. 1833, xii. S. 167. The principle has been well illustrated in various cases under the small debt acts, where the proceedings have been set aside, on the ground of the existence of such irregularities. *Hill v. Campbell*, 10 Mar. 1824, ii. S. 790, (N. E. 653); *Home v. Henderson*, 24 May 1825, iv. S. 30, (N. E. 31); *Finlay v.*



*Walker*, 4 July 1826, iv. S. 793, (N. E. 801); *Scott v. Anderson*, 3 July 1832, x. S. 760; *Wallace v. Hume*, 3 July 1835, xiii. S. 1034; *M'Laren v. Finlay*, 12 Dec. 1835, xiv. S. 143; *Miller v. M'Callum*, 1 Feb. 1840, ii. D. 524; 14 Nov. 1840, iii. D. 65; *M'Connell v. Scott*, 21 Nov. 1840, iii. D. 128. And see analogous cases not under the small debt acts; *Brown v. Heritors of Kilberry*, 1 Feb. 1825, iii. S. 480, (N. E. 334); *Smith and Tasker v. Robertson, &c.*, 27 June 1827, v. S. 848, (N. E. 788); *Calder, &c. v. Learmonth, &c.*, 27 Jan. 1831, ix. S. 343; *Sim v. Hodgert, &c.*, 24 Feb. 1831, ix. S. 507. On the same grounds, the court may compel inferior tribunals to proceed with the investigation of the questions committed to them, where they refuse to act, although it may not be competent for the court to review the decisions when pronounced, *Moderator of Presbytery of Caithness and Pope v. Heritors of Reay*, 31 July 1773, M. 7449; *Heritors of Corstorphine v. Ramsay*, 10 Mar. 1812, F. C. Where suspension and advocacy are expressly excluded, a remit with instructions will be made: *Dawson v. Allardyce, &c.*, 18 Feb. 1809, F. C.; and it was remarked on the bench, in that case, that if relief by advocacy, suspension, or reduction, could not be given, there would be a remedy by an action of damages, in which such reparation would be awarded as would check the evil. Such wrongs must be redressed; and, besides, any thing done not in exact conformity with the provisions of a statute, is not a thing done in pursuance and execution of the statute, which is necessary to confine the matter to the particular jurisdiction; *Shand v. Henderson*, 28 July 1814, ii. Dow, 519. This jurisdiction of the Court of Session is evidently of quite a different nature from that exercised in reviewing the merits of the cases intrusted to the inferior courts, and, therefore, proceedings even of church courts may be quashed on the above grounds; *Ross v. Find-*

later, 2 Mar. 1826, iv. S. 514, (N. E. 522). See *infra*, Sect. ix.

This court is also competent to decide not only incidentally, but directly, in an action of declarator at the instance of one having a grant of jurisdiction, as to its extent and nature; *Magistrates of Stirling v. Sheriff-Depute of Stirling-shire*, Nov. 1752, M. 7584; *Magistrates of Edinburgh v. Officers of State*, 14 Dec. 1825, iv. S. 319, (N. E. 322).

#### SECT. VIII.—JURISDICTION IN REVENUE CASES.

Several questions have arisen as to the jurisdiction of the court in matters connected with the public revenue. By the act 6 Anne, c. 26, (1707), the Scottish Court of Exchequer was established, and a privative jurisdiction conferred on it, as to matters relating to the revenues of customs and excise, and as to all honours and estates, real and personal, and forfeitures and penalties, of what nature soever, arising to the crown within Scotland; *D. of Atholl, &c. v. Murray*, 16 Jan. 1751, Elch. Notes, 228. But it was declared, that the crown's title to any honours, lands, or casualties, should be tried as formerly in the Court of Session. By various legislative enactments, the Court of Exchequer has latterly been subjected to many important alterations. The duties of the barons are now performed by judges of the Court of Session, and the jurisdiction otherways regulated. The functions of the Court of Exchequer relating to the direction of the revenue are transferred to the Commissioners of the Treasury, but its legal jurisdiction generally is preserved. See 2 Wm. IV. c. 54, (23 June 1832), 3 and 4 Wm. IV. c. 13, (17 May 1833); 4 and 5 Wm. IV. c. 16, (22 May 1834); 5 and 6 Wm. IV. c. 46, (31 Aug. 1835); 1 Vict. c. 65. (15 Aug. 1837); 2 and 3 Vict. c. 36, (29 July 1839); A. S. 8 Aug. 1839.

It has been decided that the Court of Session has no juris-

diction in a declarator of immunity of taxes, imposed by a British statute, *D. of Queensberry and L. Hopeton v. Officers of State*, 15 Dec. 1807, F. C. ; M. Apx. Juris. No. 19, and a charge for crown feu-duties, given by the Barons of Exchequer, though proceeding on a horning passing under the signet, cannot be suspended in the Court of Session, *Warrender v. M'Kenzie, &c.*, 19 June 1810, F. C. ; see also *Black v. M'Lachlan*, 12 Feb. 1833, xi. S. 378. Neither has this court any jurisdiction in an application under the act of grace, by a person imprisoned under an Exchequer warrant, for non-payment of a revenue debt, *Roy v. Young and Wilson*, 17 Feb. 1824, ii. S. 719, (N. E. 600) ; nor where the incarceration has taken place in virtue of Exchequer process, for non-payment of a duty or tax, can it judge of the justice or amount of the duty or tax, the right of the party to aliment, or the mode that may be competent to him for effecting his liberation, *Pool v. Irving, &c.* 17 Dec. 1831, x. S. 152 ; see also *Lawrie v. Hill*, 2 Mar. 1832, Bill-Chamber, Deas and And. v. 55 ; nor can it entertain an action at the instance of one revenue officer against another, for a share of contraband goods condemned in Exchequer ; *Shaw v. Grosset*, 5 Jan. 1750, Elch. Jurisd. No. 51 ; *Martin v. Watt*, 1763, v. Sup. 495 ; Hailes, 186. But it has been found competent to pursue the cautioners of a deputy postmaster, before the Court of Session, for the recovery of arrears, (the action being founded on the bond of caution), on the ground that it is merely a claim for a civil debt, constituted by bond ; *Postmaster General v. Kerr, &c.*, 8 July 1813, F. C. An action to relieve cautioners of the obligation come under, for a collector of taxes, is also competent in this court, for it has no relation to payment of the king's revenue ; *Kinloch, &c. v. M'Intosh*, 13 June 1822, i. S. 491, (N. E. 457). Where a revenue officer, under the pretence of searching for smuggled goods, has committed a trespass, an action of damages against him, is competent in the Court of Session ; *Reid,*

*Suppl.* 19 July 1765, M. 7361. The court has also passed a bill of suspension of the sentence of an excise court, on the ground of irregularity, *M'Ara v. Carrick*, 15 Dec. 1821, i. S. 216, (N. E. 206); *Campbell v. Mill*, 28 June 1823, ii. S. 440, (N. E. 392); and see *Mair v. Mill*, 7 June 1822, i. S. 473, (N. E. 440); and has interdicted parties from passing signatures in Exchequer; *Dickson v. Hotchkis and Tytler*, 6 Mar. 1815; F. C.; *Tatnall v. Reid*, &c. 2 Feb. 1827, v. S. 277, (N. E. 258). In *Lord Dundas v. Gifford*, 26 Feb. 1824, ii. S. 741, (N. E. 619), it was held that an action of declarator of the rights of the heritable proprietor of the Earldom of Orkney and Lordship of Zetland, under titles from the crown, against the heritors and udallers, regarding duties payable by them, was competently brought in the Court of Session. In the case of *A. and D. Scott, Petrs*, 28 Jan. 1823, ii. S. 160, (N. E. 145), the question was raised, whether the court could nominate a *curator bonis* to a bastard's natural child, in whose favour an application had been made to Exchequer for a gift of his property.

In cases of difficulty, and where there was a collision of the jurisdictions of the Session and Exchequer, it was formerly not unusual to hold conferences with the Barons, A. S. 6 Dec. 1753; and the form of desiring the conference was, to send the Lord Advocate, and, in his absence, the Solicitor General, to request a meeting, though it has been doubted whether they were bound to carry the message; Elchie's Notes, 232.

#### SECT. IX.—JURISDICTION IN ECCLESIASTICAL MATTERS.

The Court of Session has no control over the proceedings of Ecclesiastical Courts, except in cases of gross abuse or excess of powers, or disregard of statutory provisions, as already mentioned. It cannot, therefore, review those sentences which respect a man's status in the established

church, or as a member of a religious community. Thus, if a kirk-session refuses to admit a person to the sacrament, the Court of Session has no power of control; and though they should state grounds for their refusal of a nature injurious to the applicant, still, for what the kirk session has thus done, in its judicative capacity, the members are not answerable, by action of damages or otherways, in a civil court; *Robertson v. Preston, &c.*, 11 Aug. 1780, M. 7465. See *Auchincloss v. Black*, 6 Mar. 1793, Hume, 595; *Grieve v. Smith*, 12 Feb. 1808, Hume, 637; *Brownlee v. K. S. of Carlisle*, 1 July 1819, noticed in report of Auchincloss, *supra*; *M'Lean v. Fraser*, 19 May 1823, iii. Mur. 353; *Smith, &c. v. Galbraith, &c.*, 6 June 1839, reported 21 Feb. 1843, v. D. 665; *Edwards v. Begbie, &c.*, 26 June 1847, ix. D. 1384. But this is all the length to which the members are protected. If the minister or elders, under cover of their official character, defame one, either in the pulpit or in private conversation, or by writing, they are liable in damages, and must answer in the supreme court, in ordinary form, *M'Dougall v. Campbell*, 7 Mar. 1828, vi. S. 742; *Adam v. Allan*, 23 June 1841, iii. D. 1058; *Smith v. Gentle*, 31 Jan. 1844, vi. D. 565; and even though a clergyman may be justifiable in preaching a sermon, he may be liable in damages, should he publish it; *Snodgrass &c. v. Wotherspoon*, Jan. 1776, v. Sup. 573. A sentence of a church court, also, which directly affects a party's civil interests, though arising incidentally out of a matter of ecclesiastical cognizance, is subject to review by the supreme court. Thus a sentence of a presbytery, declaring a writer incapable of appearing in future as an agent before them, on account of their having taken offence at his behaviour, on occasion of a settlement of a minister, was reduced by the Court of Session; *Rutherford v. Presbytery of Kirkcaldy*, 17 Nov. 1785, M. 7469. Their proceedings, even in proper ecclesiastical matters, may be investigated incidentally by this court:

Thus, a minister having been deposed by an irregular sentence, and having, notwithstanding, charged the heritors for payment of his stipend, the court, after allowing a proof of the practice of presbyteries in signing their minutes and proceedings, found the letters orderly proceeded, in respect there was no proper evidence produced of the charger being deposed; *Dickson v. Heritors of Newlands*, 6 Feb. 1768, M. 7464.

The late Division in the established church arose from the courts of law having declared the Veto Act, passed by the General Assembly in 1834, (giving to male heads of families of the congregation a power of rejecting the patron's nominee, without cause assigned), *ultra vires* of the Assembly, and illegal. The following are the leading cases connected with that conflict of the civil and ecclesiastical judicatories; *E. of Kinnoul v. Presbytery of Auchterarder*, 27 Feb. 1838, xvi. S. 661, Aff. May 3, 1839, M'L. and Rob. 220; *Clark v. Stirling*, 14 June 1839, i. D. 955; *Mackintosh v. Rose*, 17 Dec. 1839, ii. D. 253; *Presbytery of Strathbogie, Suprs.* 20 Dec. 1839, 14 Feb., 11 June, and 11 July 1840, ii. D. 258, 585, 1047, 1380; *Edwards v. Cruickshank*, 18 Dec. 1840, iii. D. 282; *E. of Kinnoul v. Ferguson*, 5 Mar. 1841, iii. D. 778, and iv. 1472; *Cruickshank, &c. v. Gordon, &c.*, 10 Mar. 1843, v. D. 909.

The right to a seat in a church being a civil matter, is a case in which the church courts are not the sole judges; but their decision, if erroneous, may be rectified by the civil court; *Bird v. Justice*, 17 Feb. 1693, iv. Sup. 77.

This court has also jurisdiction to set aside the proceedings of a presbytery, under the acts 43 Geo. III. c. 54, (11 June 1803), and 1 and 2 Vict. c. 87, (10 August 1838), relative to schoolmasters, where it exceeds its powers, or commits irregularities; *Dawson v. Allardyce*, 18 Feb. 1809, F. C.; *Heritors of Corstorphine v. Ramsay*, 10 Mar. 1812, F. C.;

*Brown v. Heritors of Kilberry*, 1 Feb. 1825, iii. S. 480, (N. E. 334); 15 Nov. 1825, iv. S. 174, (N. E. 176), Aff. 12 June 1829, iii. W. and S. 441; *Ross v. Findlater*, 2 Mar. 1826, iv. S. 514, (N. E. 522); *Mathieson v. Dunsmure*, 16 Dec. 1829, viii. S. 252; *Murray v. Donaldson*, 5 Dec. 1834, xiii. S. 128; *Heritors and Mags. of Annan v. Herbertson*, 21 Feb. 1837, xv. S. 645.

SECT. X.—OVER ADMINISTRATORS OF HOSPITALS,  
TRUSTEES, &c.

The Court of Session has in like manner a jurisdiction to control the management of the administrators of hospitals, mortifications, (lands left in mortmain), and charities. *Merchants' Co. v. Trades of Edinburgh*, 9 Aug. 1765, M. 5750; *Forbes v. Town Council of Glasgow*, 21 Feb. 1827, xv. S. 628, Aff. 13 June 1839, M'L. and Rob. 530; *K. S. of Monimail v. Espline*, 21 Nov. 1828, vii. S. 45; *Govs. of Gordon's Hospital v. Minrs. of Aberdeen*, 8 July 1831, ix. S. 909; *Ross v. Govrs. and Trs. of Heriot's Hospital*, 14 Feb. 1843, v. D. 589; and any individual manager may call his brethren to account for malversation, *Merchants' Co. of Edinburgh supra*, and *Macausland, &c. v. Montgomery, &c.* 16 Jan. 1793, M. 2010; and in the event of a failure of administrators, the court will make a new nomination of trustees; *Campbell v. Lord Monzie, &c.*, 26 June 1752, M. 7440; or of parties to act as factors, *Falconer, Petr.*, 4 Dec. 1830, ix. S. 142; But under a private trust, the Lords found it had lapsed by the nonacceptance of the trustees, and as the deed conferred a discretionary power, the Court refused to exercise that power. *Dick v. Ferguson*, 22 Jan. 1758, M. 7446; see *Lord Melville &c. v. Lady Baird Preston*, 8 Feb. 1838, xvi. S. 457, and in House of Lords, ii. Rob. 45. Where the trustees, under an antenuptial marriage contract, had failed by death and re-

signation, and the original trustees, and their children, who were the parties interested, presented a petition craving the court to nominate new trustees,—the court refused to appoint trustees as craved, but found, in an action of declarator which was thereafter instituted, that the original trustees were themselves entitled, under the peculiar terms of the deed, to appoint new trustees, with all the powers which had been conferred upon the original trustees, by the marriage contract, *Lindsays v. Lindsay, &c.*, 19 June 1847, ix. D. 1297. The court may also control the management of the poors' fund, raised by the contribution of the members of incorporations, *Macausland supra*; *Reid v. Corporation of Mary's Chapel*, 27 May 1790, M. 1977; but will not interfere with the determination as to the claims of relief, unless where the amount is fixed by the regulations of the incorporation; *Paterson, infra*; *Fleshers of Glasgow v. Scotland*, 31 Jan. 1826, iv. S. 405, (N. E. 408), Aff. 4 June 1828, 3 W. and S. 209; *Corstorphine v. Trades of Calton*, 4 Feb. 1834, xii. S. 397; *Thomson v. Incorporation of Mary's Chapel*, 9 Mar. 1838, xvi. S. 842. Any member of the incorporation, or any person for whose behoof the fund was created, may carry on the action; *Paterson v. Skinners of Edin.*, 10 Feb. 1803, M. Apx. Aliment, No. 6; *Merchants' Co. of Edin. supra*; *Bow v. Patrons of Cowan's Hospital*, 6 Dec. 1825, iv. S. 276, (N. E. 280); *Ross supra*. See *infra*, Sect. xviii. and P. ii. 1. 19.

#### SECT. XI.—OVER PROCEEDINGS IN LYON COURT.

The Lord Lyon is entitled to examine the arms and ensigns armorial of all the noblemen and gentlemen within the kingdom; to give proper arms to "virtuous and well deserving persons;" to fine those who use arms which are not matriculated in £100 Scots; and to confiscate the moveable goods and furniture on which the arms are painted or engraved.



Messengers-at-arms are also under his control, and he may fine them or deprive them of their offices, in certain cases, for malversation; 1587 c. 46, (c. 30, Th. Ed. iii. 449); 1592, c. 127, (c. 29, Th. Ed. iii. 554); 1672, c. 21, (c. 47, Th. Ed. viii. 95), 1681, c. 95, (Th. Ed. viii. 357); A. S. 10 Mar. 1772. In matters of arms the Lord Lyon has a ministerial power, and therefore his proceedings cannot be reviewed, in as far as he gives arms, unless he invades the rights of others. The court, accordingly, will not entertain an action of reduction of a matriculation of arms, upon the ground "that the arms blazoned are not such as the defender is entitled to bear," unless the pursuer sets forth his claim to them: *M'Donell v. Macdonald*, 20 Jan. 1826, iv. S. 371, (N. E. 374). The Lyon has not a privative jurisdiction. The Court of Session, in an advocation, judged in a competition of arms, *Dundas v. Dundas*, 22 Jan. 1762, v. Sup. 493; and if the Lyon refuse arms to a party entitled, the court will give redress. In the same way, if he decern against one for penalties and escheat of moveables for assuming arms, an advocation is competent; *P. Fiscal of Lyon Office v. Murray*, 24 June 1778, M. 7656. His proceedings also against messengers-at-arms are liable to review in the Court of Session, in the ordinary form; *Campbell-Hook v. Copland and M'Coll*, 21 Jan. 1766, M. 7652; *Clyne v. Murray*, 27 Jan. 1831, ix. S. 338. But a complaint against the admission of a messenger must first be made to the Lyon, before it can be brought before the Court of Session; *Messengers of Edinburgh v. Drummond*, 26 July 1744; Elch. Jurisd. No. 31. In actions against messengers and their cautioners for malversation or neglect of duty, the Lyon may find the messenger and his cautioner liable for the sum contained in the bond of caution, but he cannot decern against either of them for the damage sustained by the parties, beyond the amount in the bond, *Grierson v. M'Iroy*, 13 Feb. 1668, M. 7651; *Hog v. Douglas or Hamilton*, 20

June 1696, iv. Sup. 355; Ersk. i. 4. 33. The Court of Session has long been in use *prima instantia*, to deprive messengers of their offices for malversation. See *A. S. Index*, voce *Deprivation*.

#### SECT. XII.—CRIMINAL JURISDICTION.

The Court of Session has also a criminal jurisdiction, but only to a limited extent, and it has been gradually restricted since the remodelling of the Court of Justiciary, 1672, c. 16, (c. 40, Th. Ed. viii. 87); Hume, Com. ii. 71; Al. Prac. 64, and is now little used. Various cases have occurred where the court refused to sustain its jurisdiction, the matters in dispute partaking more of a criminal than of a civil nature, *Berry v. Walker*, 17 Jan. 1809, F. C.; *Johnstone v. Cumming*, 29 June 1810, Hume, 260; *Baillie, &c. v. Waddell, &c.* 1 Mar. 1822, i. S. 368, (N. E. 345); *Robertson v. Bissett*, 21 May 1829, vii. S. 633; *Mackintosh v. Fraser*, 3 July 1834; xii. S. 872; *McCaul v. Millar, &c.* 17 Feb. 1838, xvi. S. 617; See *Gilchrist v. Anderson and Walker*, 17 Nov. 1838, i. D. 37. A proper jurisdiction has been conferred on the Court of Session, by statute, in the following cases:—Contravention of law-burrows, 1581, c. 117, (c. 22, Th. Ed. iii. 222); deforcement and breach of arrestment, 1581, c. 118, (c. 23, Th. Ed. iii. 223); wrongous imprisonment, when the action is pursued for recovery of the pecuniary penalties, 1701, c. 6, (Th. Ed. x. 272). In fraudulent bankruptcy, the jurisdiction was held to be private, 1696, c. 5, (Th. Ed. x. 33); *Lord Advocate v. Duncan*, 21 Jan. 1823, ii. S. 132, (N. E. 123); but by the 7 and 8 Geo. IV. c. 20, (28 May, 1827), this crime may now be prosecuted before the High Court of Justiciary or Circuit Courts. The statute 1555, c. 47, (c. 22, Th. Ed. ii. 497) declares the jurisdiction of the court in perjury and the subornation of witnesses, in general terms, but it has been restricted in practice, to the cases where those crimes are committed during the depen-

dence of a process. The punishment in such cases is fine, imprisonment, or deprivation of office, of which many instances are to be met with in the acts of sederunt. The Court of Session has also a proper criminal jurisdiction in cases of forgery, falsehood, and fraud. Those crimes, even when discovered in the course of a depending process, are now generally tried in the court of Justiciary, *Swinton's Trial of the Claimant of the Stirling Peerage*, 3 April 1839; but there are many instances of such trials taking place, in comparatively recent times, in the Court of Session, and of punishments of a very severe nature being inflicted in that court,—as transportation for fourteen years, and even for life; *A. S.* 11 Aug. 1773. When the crime, however, was thought to deserve death,—that being a punishment never inflicted by the Court of Session,—the judges merely found the forgery proven, and remitted the delinquent to the Court of Justiciary; *A. S.* 5 Feb. 1747. See *infra*, P. ii. 1. 20, and P. v. 24.

#### SECT. XIII.—TO REVIEW PROCEEDINGS OF INFERIOR CRIMINAL COURTS.

Formerly this court assumed an extensive jurisdiction in proper criminal proceedings, either by advocating causes from one criminal court to another, or by reviewing and suspending sentences. It was at that time held, that the Court of Session alone had the power of advocating or suspending. But it is now settled, that, in proper criminal proceedings, the Court of Session has no power of reviewing the proceedings of inferior courts, whether the trial have proceeded with or without a jury, and although the punishment be only a fine,—if it be ordered to be paid *ad vindictam publicam*, *Berry v. Walker*, 17 Jan. 1809, F. C.; *Johnstone v. Guthrie and Finlay*, 15 May 1810, F. C.; *Meek v. Watson*, 5 June 1812, F. C. See farther, *Jobson and Hay v. Lambert*, 29

Nov. 1828, vii. S. 83; *Robertson v. Bissett*, 21 May 1829, vii. S. 633. This court has, however, authority to inquire, whether a court claiming criminal jurisdiction in any particular case, is entitled to exercise it; and it may also have a power of review in matters of mere police—as keeping a disorderly house—as was indeed found in one case, *Maxwell v. M<sup>r</sup>Arthur*, 16 Dec. 1775, M. 7381; see also *Rodger v. Gray*, &c., 24 Nov. 1820, F. C. But if the matter inquired into is a proper crime, as theft, the court has no power of review, though it may have been tried before a police court; *Porteous v. Brown*, 9 July 1818, F. C.; and it has been doubted whether, even in matters of police, the course of review should not be confined to the Court of Justiciary, Hume, Com. ii. 72; Al. Prac. 67.—“ Upon the whole, the rule seems to be now settled, that where the public prosecutor is the accuser, or even where the private party insists, with his concurrence, but the proceedings have been of a criminal character, and a fine or other punishment *in vindictam publicam* is concluded for, the proper court of review is the Court of Justiciary.”—*Ibid.* 70.

#### SECT. XIV.—TO INVESTIGATE CRIMES INCIDENTALLY.

It is clear, that the court is competent to the investigation of all criminal acts, how atrocious soever, in as far as they are the ground of pecuniary claims by the party aggrieved, for reparation and damages; and whether the accused have or have not been tried before the criminal judge, and whatever may have been the issue of the trial. Thus, an action of damages is competent in this court against one who has been guilty of murder, fire raising, theft, or any other crime, for reparation of the patrimonial loss sustained. On the same principle, one may defend himself in this court against any claim made against him, on the ground that it has arisen from the criminal act of the pursuer. Thus, a demand for loss, in conse-

quence of a house being injured by fire, may be defended by the insurance office, on the ground that the insured wilfully set the house on fire, though this be a capital charge, and though the insured may have been tried for the fire raising before the criminal court, and acquitted; *Kerr and Trustee v. Sun Fire Office*, 17 Dec. 1793, M. 14078; Hume, Com. ii. 71; See *Moffat v. Miller*, 11 May 1820, ii. Mur. 308; Al. Prac. 65.

But when the matter arises out of criminal proceedings, and must be judged of by the principles of criminal law, the Court of Session has no jurisdiction. Thus, suppose a bail-bond given for the appearance of a party in a criminal court, to answer for a crime, is forfeited, it is incompetent to suspend the charge for payment in the Court of Session; or suppose that one has been apprehended on a charge of robbery, and the stolen property has been taken possession of, and made part of the precognition, and that, while inquiries to discover the robbers are still going on, the party apprehended makes an application for recovery of the property,—such proceedings can take place in the criminal courts alone; Hume, Com. ii. 73; Bell's Notes, 153; Al. Prac. 68.

#### SECT. XV.—INCIDENTAL JURISDICTION ILLUSTRATED.

Many more illustrations might be given of the jurisdiction of the court to inquire incidentally into matters in regard to which it has no direct authority, for the sake of explicating its jurisdiction, and deciding on the civil rights of parties. Thus, if an action be raised to set aside a deed on the ground of forgery, or on account of its having been granted as the price of an adulterous or incestuous intercourse, the civil court must necessarily have the power of inquiring into those crimes. Indeed, inferior courts must, for the same reasons, often judge of the effect of crimes on the civil rights of litigants, *Ersk. iv. 4. 68*. On the same principle, this court

may try a party's right to a peerage, in cases where it is declared by an entail that the heir in possession shall forfeit the estate, if he succeed to a peerage, as in the Panmure and Cumbernauld entails; or if a bond were declared payable to a person on his succession to a peerage; or where it was stated as an objection to a person remaining on the roll of freeholders, that he was in reality a peer, though he did not assume the title; *Dunbar, &c. v. Sinclair*, 2 Feb. 1790, M. 7395. In such cases, it is impossible to determine the patrimonial rights of parties, without ascertaining whether the party be a peer or not. But it was held that an action could not be maintained in the Court of Session by a party served heir of provision under a charter conveying lands and a peerage, against a party having right to the lands,—for exhibition and delivery of all titles relative to the peerage as his own proper writs,—where his right to the peerage had not been recognised by the crown, and the pursuer admitted he had no patrimonial interest in the lands, *Campbell v. Lady Mary Lindsay Crawford*, 25 Feb. 1824, ii. S. 737, (N. E. 615), as reversed in the House of Lords, 26 May 1826, ii. W. & S. 440. Though the proper mode of investigating whether a person be an idiot or not, is by the brieve of idiocy, and a trial by jury before an inferior judge, a declarator of nullity of marriage may be competently tried before the Court of Session, though the sole ground of action be, that the party is an idiot, and so incapable of marriage; *Blair v. Blair*, 25 July 1747, M. 6293. In this case there had previously been a cognition before an inquest, and the party had merely been found deaf and dumb. Further illustrations of the same principle will be found in the case of *Pirie v. Ochterlony*, 3 Aug. 1787, Hume, 248; *Downie v. Douglas*, 19 Jan. 1792, Hume, 251, where questions of marriage arose incidentally in ordinary civil actions in the Court of Session. Whether the incidental point thus emerging, will be determined within the process already in dependence, or in a separate form, will de-

pend on the nature and convenience of the case. Again, military matters are subjected to the jurisdiction of courts martial; but points of civil right, arising out of such questions, may be tried by the Court of Session; and, indeed, courts martial have no jurisdiction in matters of property or civil right. Questions, therefore, among the disbanded officers of a regiment, involving pecuniary interests, though arising out of military transactions, as well as the power of a paymaster to retain an officer's pay, may be brought before the Court of Session; *Campbell, &c. v. Maclean*, 8 Mar. 1766, Hailes, 6; *Grant v. Sutherland*, 26 Nov. 1776, M. 7363.

#### SECT. XVI.—PRIVATIVE JURISDICTION UNDER MUTINY ACTS.

The Mutiny Acts confer a privative jurisdiction in Scotland on the Court of Session, as to all actions, complaints, and suits, against any person for any thing done in pursuance of those acts, or against any member of a court martial in respect of any sentence of such court, or of any thing done in virtue or pursuance thereof; 10 and 11 Vict. c. 12, (23 April 1847), § 93.

#### SECT. XVII.—TO PUNISH CONTEMPTS, TO CONTROL CONDUCT OF ITS MEMBERS, &c.

Every court must necessarily have full power to punish all contempts of its authority, and the Court of Session has proceeded occasionally with great rigour. Banishment from Scotland has, in some instances, been awarded, *Forrest and Walker*, 8 Aug. 1782, A. S.; and suspension from office and imprisonment have often been inflicted. Hugh Riddell was transported to the plantations for stealing some silver buttons from a gentleman's clothes in the Outer House, when the court was sitting, A. S. 20 July 1675; the offence apparently having been treated as a contempt of court.

The court regulate the accommodation necessary for the

different bodies composing the College of Justice, in the Inner and Outer Houses—*S.S.C. v. W.S.*, 27 Feb. 1824, ii. S. 753, (N. E. 626), Aff. 10 June 1825, i. W. and S. 348. They have also an undoubted right to superintend and control the conduct of the members of the College of Justice, in the exercise of their respective functions, as well as the conduct of notaries and messengers at arms, in their official capacities, and to restrain and correct, by suspension from office, deprivation, fine, or imprisonment, any malversations they may discover, whether directly brought before them by petition and complaint, or appearing in the course of a depending process. Many cases of the exercise of such powers, in regard to advocates, agents, notaries, and messengers at arms, are accordingly to be found recorded in the Acts of Sederunt. Instances of summary complaints against the clerks of court for alleged irregularities in the discharge of their duties will be found in the following cases, *Lang v. Lang*, 16 June 1831, ix. S. 748; *Lord Advocate v. Bruce*, 22 June 1837, xv. S. 1184; and in the case of *Spalding v. Laurie*, 7 July 1836, xiv. S. 1102, the agents of one of the parties having written a letter to the assistant clerk, accusing him of having altered and distorted interlocutors in the cause, were ordained to retract the charges, and to apologise to the court and the clerk, on the matter having been brought under the notice of the Lord Ordinary, and by him reported to the court.

By the Act 1 and 2 Vict. c. 118, (16 Aug. 1838), § 30, direct statutory powers are conferred upon the court to remove any of its officers for neglect of duty or malversation. "If any clerk, extractor or other officer of court, shall neglect his duty, or shall be guilty of any malversation in office, or shall exact or receive any fees or perquisites other than those due to him in virtue of his office, or contrary to law, it shall be competent for the Court of Session, on such charge or



charges being proved, in any summary application by petition and complaint, at the instance of the party or parties aggrieved, or of her Majesty's Advocate for the time being, to pronounce such judgment as in the circumstances of the case may seem just, not exceeding deprivation of office, and expenses of the proceedings, besides the repayment of any such fees or perquisites unduly received, which shall be paid either to the party complaining or to the fee fund, as the court shall direct."

The litigants, in cases depending before the court, are also liable to be summarily proceeded against, and punished for any improper conduct, in relation to the law suits in which they are engaged. A pursuer will not be allowed to circulate a calumnious summons of damages in dependence before the court; and, indeed persons, though neither litigants, members of court, nor engaged in the cause, may be summarily ordered to deliver up the copies of any such summons which they may have in their possession; *Gilfillan v. Ure, &c.* 18 May 1824, iii. S. 21, (N. E. 15). Parties may also be punished for publishing statements relative to a depending process, whether they have derived their information from those concerned, or from hearing the matter in open court, or otherwise, and whether the statements be true or false; for such publications may be injurious to the parties, or interfere with the due administration of justice; *Henderson v. Laing*, 10 Dec. 1824, iii. S. 384, (N. E. 271); *M'Lauchlan v. Carsan*, 16 Dec. 1826, v. S. 147, (N. E. 133); *Miller v. Mitchell*, 7 Mar. 1835, xiii. S. 644; *Smith v. Mitchell*, 16 Dec. 1835, xiv. S. 172.

#### SECT. XVIII.—NOBILE OFFICIUM.

The court, also, has long been in use to appoint curators, or factors, to take charge of the property and effects of those

who, by imbecility, disease, pupillage, absence in foreign countries, extreme old age, or other causes, are unable to attend to their own affairs. The court is said to exercise those powers in virtue of what is often termed its *nobile officium*, an expression borrowed from the civil law, where it was used to denote the proper office of the prætor, in opposition to the *judicium mercenarium*, of certain inferior judges. Stair iv. 3. 1; A. S. 1532—1553, &c. Pref. x. *et seq.* Of those general functions, which must be exercised by every supreme civil court, it has been said that “it is difficult either to define the limits or to trace the origin,” More, ccclxxiv. They have been exercised in a great variety of other cases. Factors or curators have been appointed where trustees, named by a family settlement, have all died, or where they have become bankrupt; *Witherspoon, &c. Petrs.*, 15 Dec. 1775, M. 7450 and 16372; Hailes, 665; v. Sup. 443; *Macdowall, &c. v. Macdowall, &c.* 20 Nov. 1789, M. 7453; *Grant, &c. Petrs.* 13 Feb. 1790, M. 7454; *Towart, &c. Petrs.*, 14 May 1823, ii. S. 305, (N. E. 268); *Smith, &c. Petr.*, 15 May 1832, x. S. 531; *Christy v. Paul*, 10 July 1834, xii. S. 916; *Douglas or Beving, &c. Petrs.*, 14 Dec. 1839, ii. D. 238, and many other cases. See S. Dig. *voce* Jud. Factor. Where a *sine quo non* was incapable of acting, the court once authorised the remaining trustees to act without him; *Baird, &c. Supplts.* 3 July 1711, M. 7431. But, in a later case, *Donaldsons, Petrs.* 21 Dec. 1770, M. 16364, the court would not authorise tutors and curators to act without a *sine quo non*, who had become incapable, but appointed a factor *loco tutoris*; See *Marjoribanks, &c. Petrs.* 27 Feb. 1822, i. S. 355, (N. E. 333). See *supra*, Sect. x.

This court has also a variety of other powers, which hardly admit of an accurate definition. The Scottish privy council, which ultimately, besides its powers in matters of state and police, came to have a supreme jurisdiction in all questions

of wrong, for which no redress could be had in the common courts of law, was abolished by 6 Anne, c. 6, (1707), and a part of its functions seems to have been assumed by the Court of Session; *Bryce v. Graham*, 26 May 1826, ii. W. & S. 496, 502; (Judges Speeches); *Hamilton v. Boyd*, &c. 28 July 1741, M. 7335. The power formerly possessed by the privy council of Scotland of suspending the acts prohibiting the importation of foreign victual, on occasion of impending scarcity, was conferred upon the Courts of Session, Justiciary, and Exchequer, by the statute 14 Geo. II. c. 7, (1741), but it is certain that the court, from its institution, has frequently exercised extraordinary powers in dispensing with the strict rules of law, declaring by enactments what the judges considered the law to be, &c. A. S. 1532—1553, &c., Pref. x. Matters have occasionally engaged the attention of the court, with which it would hardly be expected the supreme civil tribunal of the country would concern itself; such as the price of fowls, A. S. 103; selling butcher meat by weight, A. S. 271, 289, and 301; preventing the sale of bad ale, 280: compelling the brewers to brew beer, 283, (on this occasion the court received the thanks of the government for their interference, *ibid.* 284); ascertaining the price of candles, 311; regarding the importing of grain, 361, &c.; but these precedents have not been followed in later times.

The court, however, is in the constant practice, on the occurrence of vacancies in various offices, of appointing parties to perform the duties *ad interim*, until a new nomination can be made by the crown, as upon the death of sheriffs, commissaries, sheriff-clerks, &c. A. S. 17 July 1744, (where the petition for the nomination of two sheriffs-depute of a county *ad interim*, proceeds upon the narrative that the Privy Council had been in use to make such appointments); *Dundas, Petr.* 20 Jan. 1837, xv. S.

398; *Speirs, Petr.*, 23 Dec. 1842, v. D. 388; *Gracie, Petr.*, 20 May 1840, ii. D. 839; so with reference to the keeper of the signet; keepers of the records, as of the register of sasines, inhibitions, entails, &c. In one case, where, by the set of the burgh, the magistrates were ordered to hold their meetings in a certain place, the Second Division authorized the meetings to be held elsewhere, while a new room was building; but, in another case, the First Division refused such an application as unnecessary; *Mags. of Kirkaldy*, 10 Mar. 1826; *Mags. of Kinghorn*, same date, iv. S. 547 and 549, (N. E. 556 and 557). On a petition from the *Mags. of Burntisland*, setting forth that their town-house had been demolished under an act of Parliament for making a new pier, and that they had agreed to meet in a large room belonging to the Shipmasters' Society, till a new town-house should be ready, the court authorized them to hold their meetings as proposed, A. S. 14 Aug. 1844, (unprinted). On a petition from the Magistrates of Aberdeen, the site of the market cross was allowed to be changed, *Ibid.* 24 Nov. 1841, (unprinted). When a town clerk, also, acquires property within burgh, as he cannot infest himself, the court will appoint another notary to give him infestment, *Duff v. Mags. of Elgin*, 16 Jan. 1823, ii. S. 117. Prior to the act 2 and 3 Vict. c. 42, (17 Aug. 1839), for the improvement of prisons and prison discipline, when new jails were erected, the Court of Session was always applied to, to declare them legal prisons. On being satisfied, by the certificates of medical men, and of the sheriff of the county, or other competent persons, as to the sufficiency and salubrity of the new building, it was declared a legal prison, and the debtors were authorized to be removed to it from the old, A. S. 11 Dec. 1813, &c. It was held that the Lord Ordinary on the bills, during vacation, had no power to declare a jail a legal prison, and that the court could not delegate this power to him; *Mags. of*

*Kirkaldy*, 5 July 1827, v. S. 894.<sup>1</sup> On account, however, of the urgency of some appointments, and the evils which might arise from their being delayed, the Lord Ordinary<sup>2</sup> on the bills is in use, during vacation, to name sheriffs-depute, commissary clerks, factors, &c. A. S. 25 Aug. 1810; A. S. 3 April 1810,—&c.; *Mags. of Burntisland*, *supra*; A. S. 12 May 1847, (unprinted); A. S. 4 June 1847, (unprinted).

Where any of the practitioners before the court, notaries public, &c. have changed their names, from succeeding to an entailed estate, or from any other cause, the court, on application by petition, has been in use to authorise them to do so in all judicial proceedings. In the case of *Alexander Kettle Young, Petr.* 14 Jan. 1835, a writer to the signet having obtained the royal license to assume an additional surname, and having prayed the court to sanction his using it in all legal acts and deeds, the petition was withdrawn as unnecessary, the Lord President (Hope) remarking, "there is no need of the authority of this court to enable a man in Scotland to change his name." It will be remarked that here a royal license had been previously obtained. Various subsequent instances, however, have occurred of practitioners presenting applications to the court for authority to alter their names, and where the petitions were granted, *Inglis, Petr.* 29 Nov. 1837, xvi. S. 211; *Smith*, A. S. 19 Jan. 1841, (unprinted); *Grant, &c.* A. S. 10 July 1841, (unprinted), (where the parties did not hold any

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<sup>1</sup> New jails are now declared legal prisons by a published declaration and order of the General Board of Directors of Prisons, under the statute referred to in the text.

<sup>2</sup> "An Ordinary in most cases cannot exercise the *nobile officium*. See *Stair*, p. 624, § 48," (iv. 20. 48), *Tait's MS. "Nobile Officium."* When a *curator bonis*, for example, is appointed by the Lord Ordinary on the bills during vacation, he is only named *ad interim*, till the meeting of the court. A supplementary petition addressed to the court will then be given in. *Scott, Petr.* 22 May 1845, vii. D. 638.

public or official situation, but had merely succeeded to an entailed estate); *Steele*, A. S. 14 June 1843, (unprinted), *Stewart*, A. S. 22 May 1845, (unprinted).

Many other examples of the exercise of those different powers will be found in the Acts of Sederunt, where the petitions and procedure upon them are recorded. The court, in special circumstances, authorized sheriff officers to officiate as messengers, in executing diligence against witnesses in the sale of an estate, *Mitchell*, 19 June 1764, M. 7355, v. Sup. 562; it has deprived a father of the custody of his children, on a summary petition presented by their grandfather, because their father was addicted to habits of gross intemperance, and endangered the lives of the children by maltreatment, *Ballie v. Agnew*, 4 July 1775, v. Sup. 526. The court will also interfere to deprive a mother who misconducts herself, of the custody of her children, *Hogg v. Stoddart*, 6 July 1805; Hume, 889, *Walker v. Walker*, 10 Mar. 1826, ii. S. 788, (N. E. 651); *Paul, Petr.* 8 Mar. 1838, xvi. S. 822; *E. of Buchan v. Lady Cardross*, 27 May 1842, iv. D. 1268; and it may suspend the diligence of creditors, to the effect of bringing the debtor within the jurisdiction of a criminal court for trial, *Hope v. Prosser*, 11 Dec. 1816, F. C.; or of enabling him to attend the diets of ecclesiastical courts; *Presbytery of Dumfries, Petr.* 7 July 1818, F. C.; *Dr. Moodie, Petr.* 18 May 1819, F. C.—&c. The persons of minors, about to appoint curators, have also been sequestrated, that their choice might not be unduly influenced, *Bargany v. Hamilton*, 14 July 1702, M. 16319. A variety of other powers are exercised by the Court of Session, which must necessarily be intrusted to the supreme civil court of the country. *Ersk.* i. 3. 23. See *Infra*, P. v. 15.

#### SECT. XIX.—ACTS OF SEDERUNT.

It is inherent in every supreme court to lay down rules for the forms of proceeding in the business which comes

before it. The regulations thus made by the Court of Session are called Acts of Sederunt. By the statute, establishing the College of Justice, 1537, c. 36, (1532, c. 2, Th. Ed. ii. 335);<sup>1</sup> power was given to the King to make rules and statutes for the ordering of justice. Those powers were delegated by the King to the Chancellor, President, and the other Lords. The first acts of sederunt made upon occasion of the institution of the College of Justice, were ratified by the King, 10 June 1532,<sup>2</sup> and by Parliament, 1540, c. 93, (c. 10, Th. Ed. ii. 371), A. S. 1532—1553, &c. Pref. v. By the act of parliament last referred to, the judges were expressly empowered to “mak sic actis, statutis, and ordinances, as thai sall think expedient for ordoring of process and hasty expeditioun of Justice.” The statute 1584, c. 139, (c. 15, Th. Ed. iii. 300), acknowledges the powers of the judges in this respect, and ratifies and approves of their “statutes and ordinances,” in very broad terms. The court, however, very soon exceeded the powers conferred on it, and made new laws, and hence it was found necessary to ratify several of the acts of sederunt in Parliament. The force of acts of sederunt, making a change on the law—such as that dated 24 June 1665, relating to pro-tutors; the A. S. 28 Feb. 1662, relative to executors-creditors; the A. S. 14 Dec. 1756, introducing a new form of removing tenants, different from that appointed by the act 1555, c. 39, (c. 12, Th. Ed. ii. 494),—depends on the inveterate practice that has followed on them, which evinces the acquiescence of the community; for such practice and acquiescence of themselves make law, Ersk. i. 1. 43; and our whole common law rests on no other foundation. See also Pref. to A. S. 1532—1553, &c. x; Report to House of Lords, by Judges, 27 Feb. 1810, A. S. 52.

The acts of sederunt which have been made for the last century, have been almost all strictly confined to the regulation

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<sup>1</sup> See *supra* p. 1, Note.

<sup>2</sup> See *supra* p. 2.

of judicial procedure; and, independently of the powers conferred by the old statute 1540, it has been customary, in statutes affecting judicial proceedings, to authorize the court to pass acts of sederunt, to carry the new regulations into more complete effect. In such cases, it is in general ordered that copies of the acts of sederunt made in virtue of such powers, be laid before parliament within a limited period. See 6 Geo. IV. c. 120; (*Judic. Act*, 5 July 1825), § 58; 11 Geo. IV. and 1 Gul. IV. c. 69, (23 July 1830), § 16; 1 and 2 Vict. c. 118, (16 Aug. 1838), § 33,—&c. &c.

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### CHAPTER III.

#### OF THE JUDGES AND PRACTITIONERS.

We shall now proceed to treat of the Judges and different Practitioners before the College of Justice, beginning with the Judges.

##### A—OF THE JUDGES OF THE COURT.

###### SECT. I.—THEIR TITLE AND QUALIFICATIONS, &c.

The Court of Session, we are told by Sir George Mackenzie, *Instit.* i. 3, (*Works* ii. 282), was founded on the model of the parliament of Paris, and it has enjoyed the title of the College of Justice since its institution, and its judges have been styled Senators,<sup>1</sup> 1537, c. 36, (1532, c. 2;<sup>2</sup> *Th. Ed.* ii. 335); 1540, c. 93, (c. 10. *Th. Ed.* ii. 371). The designation, however, which they take in all writs and proceedings before them, is “Lords of Council and Session,” in consequence of the new court having come in place of the old Courts of

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<sup>1</sup> See *supra* p. 2, Note 2.

<sup>2</sup> See *supra* p. 1, Note.



Session and the Daily Council. On their elevation to the bench, each of the judges assumes the title of "Lord," not only in judicial business, but in private society; and they sometimes take their titles from the name of their estates. The Lord President<sup>1</sup> and Lord Justice Clerk are always designated by their offices. Formerly it was the practice for the judges to retain their titles, after they resigned their offices, A. S. 10 Feb. 1637; And this is still occasionally done, A. S. 16 Nov. 1826. It has been decided that the widows of the judges are entitled to enjoy the privileges of their husbands during widowhood, but the cases are of old dates, *infra*, P. i. 6. 4. *in fin.* By the original constitution of the court, it was required that one half of the judges should be churchmen, and it seems also to have been necessary that the President should be a Pre-late, 1579, c. 93, (c. 38, Th. Ed. iii. 153). Great complaints having, however, been made, "that the king appointed young men, without gravitie, knowledge, and experience, not havand sufficient living of their awin, upon the Session," who received bribes from the suitors, the statute 1579, c. 93, (*supra*), was passed, regulating the admission of the judges, and it was declared that the President was to be chosen by the whole judges, "quhidder he be of the spiritual or temporal estaite." Even after the Reformation, many instances occur of clergymen being appointed judges; but this practice was put an end to by the statute 1584, c. 133, (c. 6. Th. Ed. iii. 294), for the "ministers of God's word and sacraments" were by that act prohibited from accepting any judicial situation, civil or criminal, or being of the College of Justice commissioners, advocates, court clerks, or notaries, except in the making of testaments, under pain of deprivation of their office. This incapacity was extended to all clergymen by a statute passed during the usurpation,

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<sup>1</sup> See *supra* p. 3, Note.

1640, c. 26, (c. 27, Th. Ed. v. 306); and although this act was repealed by the general rescissory act of Charles II. 1661, c. 15, (c. 126, Th. Ed. vii. 86), no clergyman has since that period been created a senator of the College of Justice. Indeed, since the Union, the necessary qualifications of a judge to be immediately noticed, may be said to infer the exclusion of clergymen from this office.

Besides the ordinary Lords of Session, the king was formerly entitled to name three or four extraordinary Lords. This number was, however, often exceeded, and instances occur where seven or eight extraordinary Lords appear in the sederunt. Fears, however, having been entertained, that by their attendance on particular occasions,—for they were not bound to attend regularly,—the free course of justice might be impeded, a statute was passed in 1723, (10 Geo. I. c. 19), enacting, that the vacancies which might take place among the extraordinary Lords should not be filled up. These Lords had no salaries, and did not go through any examination previous to their admission.

By the original constitution of the court, the qualifications necessary seem to have been judged of by the king in parliament, (*infra*, next section). By the act 1579, c. 93, *supra*, King James VI. with consent of parliament, declared that he would nominate to be a judge of the court, only “ane man that feiris God, of gude literature, understanding of the lawes, of gude fame, havand sufficient leving of his awin.” The party nominated was ordained to be examined by the Lords before his admission, and he might be rejected, if he was found unqualified. By another act, 1592, c. 134, (c. 50, Th. Ed. iii. 569), no one can be appointed a judge unless he be twenty-five years of age, and have property pertaining to himself, worth, in yearly rent, 1000 merks, or else 20 chalders of victual, which would now exceed in

value £300 per annum.<sup>1</sup> The Treaty of Union, 1707, c. 7, art. 19, (Th. Ed. xi. 411), prohibits any one from being named an ordinary Judge of Session, unless he have served in the court, as an advocate, or a principal clerk of session, for five years, or as a writer to the signet for ten; but a writer to the signet must, at least two years before his nomination, undergo a public and private trial on civil law, before the Faculty of Advocates, and be found by them qualified for the office. Power is also reserved to the Parliament of Great Britain to alter these qualifications. By another act, (10 Geo. I. c. 19, 1723), the king must nominate persons qualified according to those two acts and the Treaty of Union, and it is the duty of the Court of Session to examine whether a presentee be so qualified. The mode of trial was laid down by A. S. 31 July 1674, by which the Lord, presented by the King, is required to sit three days beside the Ordinary in the Outer-house, and to report the cases debated there in presence of the whole Lords; and he is also required to sit a day in the Inner-house, and, after hearing the debate, to give his opinion on the case, before the court proceeds to advise it. This form applies to the President as well as the other judges, Elchies' Notes, 214. If the court find the presentee duly qualified, they admit him to his office, after administering the oaths to government, and *de fidei*.

On one well known occasion, the Lords rejected a presentee. George I. having named Mr. P. Haldane of Gleneagles, advocate, an ordinary Lord of Session, the court, after a long discussion and examination of witnesses, rejected him, Robertson, 422.<sup>2</sup> In consequence, an act (10

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<sup>1</sup> See the King's Letter to the Lords, and A. S. following upon it, 31 May 1605.—A. S. 1532-1553, &c. 60.

<sup>2</sup> "Not for want of ability or other justifiable reasons, but for motives

Geo. I. c. 19, *supra*) was passed, which declares, that if the Lords, upon examination, find the presentee duly qualified, they shall immediately admit him, but if they find him unqualified, they are forthwith to certify the whole matter to his Majesty, and, if his Majesty signifies his pleasure, that, notwithstanding, he shall be admitted, the Lords of Session are then required to admit him forthwith. The act 48 Geo. III. c. 151, (4 July 1808), § 21, by which the court was divided into two chambers, enacts, that the vacancies should be filled up as before; and it is provided that the presentee shall go through the forms of admission in that division of judges only to which he is admitted, but if an objection be made to his admission, it shall be decided by the whole court. When once admitted, a Lord of Session, of course, holds his office *ad vitam aut culpam*.

#### SECT. II.—RIGHT OF NOMINATION.

The greater number of the judges appointed at the institution of the court, appear to have been chosen by the king in parliament, 1537, c. 36–41, (1532, c. 2, Th. Ed. ii. 335);<sup>1</sup> A. S. 27 May 1532, and ratification by king, A. S. 1532–1553, &c. 6, (older Edit. of Stats. 1537, c. 42, &c.)<sup>2</sup> The other judges then named, and those subsequently appointed for some time, seem to have been chosen by the crown alone, A. S. 27 May 1532, *in init.*; A. S. 16 Nov. 1532; A. S. 21 Jan. 1534. It has been already mentioned, (*supra*, p. 48), that the statute 1579 c. 93, conferred on the judges the right of electing their own President. James VI. at a sederunt of the court, 26 June 1593, A. S. 20, promised, that on all future

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which cannot be justified."—Tait's MS. "Of the Court of Session." Another case of rejection, in the reign of Chas. II., is noticed by Forbes in his Preface, v. M. Sup. Vol.

<sup>1</sup> See *supra* p. 1, Note.

<sup>2</sup> See *supra* p. 2, Note 1.

vacancies, he would name at least three persons, of whom the judges were to elect the best qualified. It was farther declared, that for the future no resignation of a judge in favour of another person should be accepted, and no presentation thereupon received by the Lords. Only two judges seem to have been appointed in this form. The exercise of the right of appointing the President of the court, as well as the judges, was soon resumed by the king, and continued in his person until the middle of the 17th century, when the nomination of the judges was vested in the king, with consent of Parliament, 1641, c. 15, (Th. Ed. v. 403). The act 1661, c. 2, (c. 6, Th. Ed. vii. 10), declared it was an inherent privilege of the crown, and an undoubted prerogative of the kings of this kingdom, to have the nomination of the Lords of Session; and the 10 Geo. I. c. 19, (*supra* p. 49), proceeds on the preamble, "that the nomination and appointment of the Lords of the Court of Session in Scotland is an inherent prerogative of the crown." All attempts to control this power have long since ceased.

SECT. III.—QUORUM, &c., JUDGES CHANGING THEIR DIVISION.

The quorum was originally ten, with the Chancellor or President, 1537, c. 57, (A. S. 27 May 1532, § 15).<sup>1</sup> It was fixed at eight by the king's letter to the court in January 1535, A. S. 1532–1553, &c. 25; and at nine by the statute 1587, c. 44, (c. 27, Th. Ed. iii. 448); and the same number still continues the quorum in matters which come before the whole court, 48 Geo. III. c. 151, (4 July 1808), §§ 4, 9, and 14. This was also formerly the quorum in the teind court, but now the quorum there is reduced to five, 2 and 3 Vict. c. 36, (29 July 1839), § 8. By the said statute of Geo. III.

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<sup>1</sup> *Supra* p. 2, Note 1.

it was declared, that after the 12 Nov. 1808, the judges should usually sit in two divisions, the Lord President and seven of the ordinary judges forming the first division, and the Lord Justice Clerk, with six of the ordinary judges, forming the second division,—the Lord President and Lord Justice Clerk presiding in their respective divisions, and in their absence, such ordinary Lord as the judges then present should name, §§ 1 and 2. The quorum in each division was declared to be four judges, § 7. By another act, 50 Geo. III. c. 112, (20 June 1810), § 32, the quorum in the inner-house was reduced to three.<sup>1</sup> Interim-execution, pending appeal, cannot be granted by less than four judges, 48 Geo. III. c. 151, § 17; *Paterson's Tre. v. Brown*, 5 July 1828, vi. S. 1086; but it is competent to call in a judge from the outer-house to make up the number, *ibid.* By 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 1, the seven junior ordinary Judges of the court were relieved from attendance in the inner-house, it being declared that they should perform the duties of the Lords Ordinary in the outer-house; and it was provided, that the judges who then sat in the inner-house should not be affected by the enactment, except with their own consent. The Lord President and three of the senior ordinary judges were declared to form the inner-house of the first division, and the Justice Clerk, with the three remaining senior ordinary judges, the inner-house of the second division. By 11 Geo. IV. and 1 Gul. IV. c. 69, (23 July 1830), § 20, the permanent Lords Ordinary were reduced to five, the whole number of judges, including the two Heads of the court, being thus thirteen. See *infra*, Sect. viii. The Lord President and Lord Justice-Clerk are always designated from

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<sup>1</sup> It is enough if the quorum be present, though all the judges do not vote.—*Robertson v. Duke of Atholl*, 21 June 1809, F. C.

their offices. They have the precedence of the others, who, among themselves, rank, solely by seniority of office, without regard to birth, title, &c.;<sup>1</sup> Spotiswood, xxxi.; New Form of Process, 7. In the absence of the Lord President or Lord Justice-Clerk, as already stated, such ordinary Lord as the judges present may appoint, presides in each division respectively, 48 Geo. III. *supra*. When a process is depending in one division, all matters connected with it subsequently occurring in the other, may be remitted to the first process, *ob contingentiam*, *Ibid*, § 9.

Where, in consequence of the death of any of the inner-house judges, or by their resignation, sickness, declinature, or unavoidable absence, the number of either division might be reduced to less than a quorum of three, the permanent ordinaries of the same division, (the ordinaries were then attached to one division), were ordered to be called in to officiate, beginning with the senior, 53 Geo. III. c. 64, (3 June 1813), § 14.

The act 2 Wm. IV. c. 5, (13 Feb. 1832), enacts, that it shall be "competent to the judges of the Court of Session, or a quorum thereof, in the case of the death, sickness, or other necessary absence of any of the Lords Ordinary of either division of the court, or of the junior Lord Ordinary acting as Ordinary on the Bills, to make such regulations by act of sederunt as may be necessary for carrying on the business of the outer-house; and that either by appointing one of the judges of either division of the inner-house to officiate in the outer-house, or Bill Chamber, during such absence of any of the above Lords Ordinary, or by appointing a Lord Ordinary of one division to act in such case, *pro tempore*, as an Ordinary of the other division." And farther, "That in case of death, sickness, declinature, or necessary absence of

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<sup>1</sup> See the precedence of the Judges of the Court of Session and Exchequer fixed, A. S. 13 June 1761.

any of the judges of the inner-house of either division, the number of judges in such division shall be reduced to less than a quorum, it shall be in the power of the division so reduced in number, and they are hereby authorized and required, to call in one of the Lords Ordinary of the same or of the other division, to sit and vote in the inner-house until the number of judges in such division be again increased to a quorum.”<sup>1</sup>

When a vacancy occurs among the inner-house judges of one division, and one of the inner-house judges of the other division is desirous to be removed to the division in which the vacancy has occurred, the Crown may comply with his request by a warrant under the sign manual. And in all cases of vacancy among the inner-house judges, the senior permanent ordinary is moved to the inner-house, 59 Geo. III. c. 45, (22 June 1819), § 1.

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<sup>1</sup> In the case of *Waddel, &c. v. Waddel's Trs.*, (not reported on this point), (see 13-16 May and 12 July 1845, vii. D. 605 and 1017) when the cause came before the Second Division of the Court, in the course of its preparation for the jury, two judges declined, on the ground of relationship to the parties. Lord Murray, the Ordinary in the cause, was called in, for the purpose of making up the quorum of the court, and sat during those discussions, except on one occasion, when an unopposed motion was disposed of, and when Lord Wood sat as the third judge. On the 26 Nov. 1845, Lord Wood, who was to preside at the second trial, was called in and sat in the inner-house, when a notice of motion by the pursuers stood in the roll for advising. The pursuers objected to Lord Wood's appearance, and contended that Lord Murray having been originally called in, could not be superseded, and that without him the court was not properly constituted. The case was delayed till the following day, when Lord Murray again took his seat on the bench, and the pursuers withdrew their objection; but the defenders having insisted that Lord Wood might still be competently called in, the court appointed the notice of motion to be boxed for the consideration of the whole court, in order that the question of constitution might be finally determined. The discussion of the point was prevented by the compromise of the case.



SECT. IV.—PROCEDURE WHERE JUDGES ARE EQUALLY DIVIDED  
IN OPINION.

In consequence of the division of the court into two chambers in 1808, it was necessary to make new provisions for cases in which the judges in one of the divisions were equally divided in opinion. The 48 Geo. III. c. 151, (4 July 1808), § 8, therefore declared that the judges presiding in each division should in case of difference of opinion have one voice, but not a casting voice, and in case of equality of voices, the cause should remain for subsequent discussion and decision; and if there should be again an equality, one of the Lords Ordinary of the same division was directed to be called in from the outer-house, in the order of their seniority as judges, to be present at the discussion, and to vote in the cause. The 53 Geo. III. c. 64, (3 June 1813), § 13, contained an enactment to the same effect, and declared that the outer-house judges of each division should be called in, in the order of their seniority, beginning with the senior. The 1 and 2 Geo. IV. c. 38, (28 May 1821), § 3, again altered this regulation in certain cases, by enacting that, in all cases, upon report of the Lord Ordinary on the Bills to either division, where there should be an equality, the Lord Ordinary on the Bills should vote; and in all other cases, where, in consequence of such equality, the cause should remain for subsequent discussion, if the question should have previously depended before any Lord Ordinary of the same division, being at the time of the discussion one of the permanent Ordinaries, such Lord Ordinary should, without regard to any rotation, be called in to be present at the discussion, and vote in the case; but when five judges sat in each division of the inner-house, and one of their number was absent at the first advising, when the equality took place, but was present when the con-

sideration of the case was resumed, it was decided that the Lord Ordinary was not to be called in, *Donald, &c. v. Robertson, &c.* 5 Dec. 1822, ii. S. N. E. 57, Note, *in fin.* and 27 Nov. 1821, i. S. N. E. 163,—Note. As the permanent Lords Ordinary are now declared to be equally attached to both divisions of the court, 1 and 2 Vict. c. 118. (16 Aug. 1838), § 4, those regulations, except in the cases reported by the Lord Ordinary on the Bills, are no longer applicable. The 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 23, enacts, that the judges of either division may, in every cause in which they are equally divided in opinion, direct the cause to be judged either by the inner-house judges of both divisions, or by the whole court, including the Lords Ordinary. See next Section.

SECT. V.—REGULATIONS FOR PRESERVING UNIFORMITY IN  
DECISIONS.

To preserve uniformity in the decisions of the court after its division, it was farther provided, that it should be competent to the judges of either division, in cases which appeared to them difficult or important, to state questions in law in writing, arising out of such cases, and to require the opinions of the judges of the other division thereupon: and that the judges consulted should give these opinions either as a collective body, or as individual judges, 48 Geo. III. c. 151, (4 July 1808), § 10; and the judges of either division are also entitled to require the opinions of all the Lords Ordinary, as well as of the judges of the inner-house of the other division, 53 Geo. III. c. 64, (3 June 1813), § 15.

The 6th Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 23, farther provides, that in all cases in which the judges shall be equally divided in opinion, they “ may direct the cause to be judged either by the inner-house judges of both divisions,

or by the whole court, including the Lords Ordinary; and in such cases as it shall appear to them advisable to have any question occurring before them settled by the judgment of the whole court, the judges of either division may order that such matter shall be heard before the whole judges, and judgment shall, in all cases, be pronounced according to the opinion of the majority of the judges present, and the interlocutor shall bear to be the judgment of the division before which the cause depends, after consulting with the other judges." The next section is a repetition of the enactment in the former statute, entitling the judges to require the opinion of the permanent Ordinaries, as well as of the inner-house judges, and it is then declared, that the judgment shall be according to the opinion of the majority of all the judges so consulted,<sup>1</sup> and shall bear that it is the judgment of the division before which the cause depends, after consulting with the other judges. It will be observed that the phraseology of these sections is peculiar. In *Stewart v. Scott*, 11 Mar. 1836, xiv. S. 692, it was decided that when the judges of the division require the opinions of the judges of the other division and of the permanent Ordinaries, on questions in writing, the judgment to be pronounced is to be in accordance with the opinions of the majority of all the judges consulting and consulted, and not according to the opinion of the majority of the consulted judges only. When the judges are, after consultation, equally divided in opinion, one of the judges declines to vote, in order that a decision may be pronounced, and an opportunity given to appeal, *Lang v. Bruce*, 7 July 1832, x. S. 777.

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<sup>1</sup> See case of *Corbet Porterfield v. Stewart* 30 May 1820, referred to in next Section.

## SECT. VI.—DECLINATURE OF JUDGES.

Our law has always been very jealous of the partiality and favour apt to be engendered by near relationship or connection. At a very early period, therefore, our parliament, following the example of the civil law, enacted, that the judges of the Court of Session should not sit or vote, in any case, in which they stood in the relation of father, brother, or son to either of the litigants, 1594, c. 216, (c. 22, Th. Ed. iv. 67); and, by a statute of Charles II. 1681, c. 13, (c. 79, Th. Ed. viii. 350), the disqualification was extended in all the judicatures of the kingdom, to father-in-law, brother-in-law, and son-in-law, and also to the relationship of uncle and nephew, *Calder v. Ogilvie*, 31 Jan. 1712, M. 197. But this last ground of declinator does not apply to uncles and nephews by affinity, *Calder*, supra; *Dalgairns*, 26 July 1776, v. Sup. 524; *Erskine v. Drummond*, A. S. 28 June 1787, and M. 2418. It is also a ground of disqualification that the daughter of the judge is married to the son of the litigant, *Corbet Porterfield v. Stewart*, 15 May 1821, i. S. 10, (N. E. 7). The same decision was given between the same parties in a competition of briefs, 30 May 1820, F. C., although eight of the fifteen judges, of which number the court then consisted, were of opinion that there was no room for the declinature. By the regulations then in force, the judgment was given in accordance with the opinion of the division of the court before which the case had been brought. But it is not a ground of declinator that the judge and party are brothers-in-law, by having married sisters, *Sir W. Binny v. Hope*, Dec. 1687, M. 3420; *Goldie v. Hamilton*, 16 Feb. 1816, F. C.; A. S. 16 Feb. 1816; nor that one of the parties is the son of the judge's brother-in-law, not by the judge's sister but by another wife, *Maxwell v. L. Newton*, Mar. 1682, M. 3420.

It would appear, that such declinators ought to be sustained, not only where the judge's relative is pursuing or defending for his own behoof, but even where he is merely acting *virtute officii*, and for the benefit of others, *Lethenton v. L. Kirkstorphon*, 17 Mar. 1555, M. 3418; *Gemmill v. Boyle*, 8 Jan. 1629, M. 3419; *Paterson v. Town of Edinburgh and Johnston*, 12 Jan. 1711, M. 3422; *Marten v. Heritors of Kirkaldy*, 23 Jan. 1840, F. 379; *M'Kay or Clyne v. Clyne's Trs.* 17 June 1847, S. Jur. xix. 547.

It is the duty of the judge to propone those declinators, though they are not stated by the party; and it seems doubtful how far a decree in absence is available, where the pursuer is related, within the above degrees, to the judge. The words of the statutes are, not that the judge may be declined, but that he shall not "sit or vote" in such cases, *Sir Jo. Preston v. Rule*, 21 June 1699, M. 3421; Bankt. iv. 2. 38. In a later case, *Douglas, Heron, and Co. v. E. of Galloway*, 2 Dec. 1774, v. Sup. 424, all the proceedings by the judge were held null and void.<sup>1</sup> See also *Maclean v. Muness*, 29 Nov. 1776, v. Sup. 455.

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<sup>1</sup> The report of this case referred to in the text, is by Mr. Tait. In his MS. ("Declinators"), it is thus farther noticed by him:—"Another case occurred. A cause at the instance of the Douglas Bank was brought against Lord Galloway, before Lord Hailes, as Ordinary. His Lordship pronounced decree of absolvitor, but a representation being given in, his Lordship recollected, that on account of his relationship to Sir Adam Ferguson, there lay a legal declinature against him; upon which he recalled his interlocutor, leaving the parties to apply for another Ordinary as they should be advised. It occurred, that it was somewhat absurd to allow the whole Lords to proceed in such a cause, and yet to allow an Ordinary to be declined; but it was answered, that the declinature against the whole Lords fell to be repelled *ex necessitate*, which did not apply to a declinature against an Ordinary, where this necessity ceased. Upon a petition setting forth the

The objection to the judge seems not to be removed, though he is equally nearly connected with both parties, nor,—in connections by affinity,—that the marriage which created the connection has been dissolved, Bankt. *ubi sup.*; Ersk. i. 2. 26; Tait's MS. "Declinators,"—but see case of *Sir W. Binny*, *supra*. When it happens, however, that the grounds of declinator apply to so many of the judges, that, were they sustained, the cause could not be decided, from there not being a quorum left, the declinator will be repelled, Tait's M.S., *ubi supra*; *Friendly Insurance Co. v. The Royal Bank*, 13 Dec. 1749, Elch. Jurisd. No. 50; *Blair v. Sampson*, 26 Jan. 1814, F. C. 1814–15, Apx. 501; A. S. 22 July 1774, 644, and A. S. 22 Jan. 1789, *ibid.*; *Hercules Insurance Co. v. Hunter*, 10 Mar. 1837, xv. S. 800. A declinator was repelled in a petition and complaint under the former election statutes, on the ground that these complaints were brought by members of a sort of community, on account of the public, *Campbell, Petr.* 2 Feb. 1745, M. 7340; but, in *Hepburn v. Hay*, 25 July 1735, it was decided that a judge could not vote in the question of his own son's qualification as a Commissioner of Supply, Elch. Jurisd. No. 7. In the case of *Sinclair, &c. v. Campbell's Trs.* 10 Mar. 1841, iii. D. 871, *in fin.*, the Lord President, (Hope), who was connected by affinity with one of the defenders, expressed a wish, though there was no legal ground of declinature, not to judge in the cause, and said he had not known a judge in such circumstances called on to do so;—and the parties acquiesced.

Our old law carried its jealousy of judges much farther than we do at present. Thus, one who had been counsel in the cause, on his promotion to the bench, was not allowed to

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fact, the Lords remitted to the Ordinary on the Bills to recall the whole former procedure before Lord Hailes, and then to do and proceed in the cause as he should see just.—6 Dec. 1774."

vote in it as a judge, A. S. 30 Mar. 1555. Judges in this situation sometimes decline to vote in our modern practice ; and if they decline, the court will not require them to vote, though urged by the parties, *Innes v. D. of Gordon*,<sup>1</sup> 21 Dec. 1827, vi. S. 279, Aff. 10 Nov. 1830, iv. W. & S. 305 ; but there is no disqualification thence arising, *King v. King*, 27 Nov. 1841, iv. D. 124.

It was even held a disqualification in our older practice, that the deed which was the subject of the suit had been drawn by the judge, *Clerkinton v. Herdmiston*, 26 July 1605, M. 3419. A judge may act as arbiter under a submission accepted by him while at the bar, *Fisher v. Colquhoun*, 16 July 1844, vi. D. 1286.<sup>2</sup> There seems to be no instance in our practice of the objection being made, that the judge has a cause in dependence, which must be decided by the same rules as that before him, though it was a good objection in the civil and canon laws, *si foveat consimilem causam*.

Another obvious ground of objection to a judge, is his having an interest in the issue of the cause. In the ordinary case, it is impossible to get over this objection ; but when a quorum of the judges would not be left, were the declinator sustained, it will be repelled, as in other cases of declinator,

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<sup>1</sup> In this case, the effect of judges retiring, or being appointed during the discussion of a cause, will be found considered. See foot note at end of report of *Christie, &c. v. Royal Bank*, 17 May 1837, i. D. 745. In *Smith v. Mackay*, 27 Jan. 1835, xiii. S. 323, it was held competent for a judge who presided at a jury trial, to sign a bill of exceptions, although he had resigned before the bill was prepared for signature ; and in *Shepherd v. Grant's Trs.*, 24 Jan. 1844, vi. D. 464, effect was given to the opinion of a consulted judge, who had retired from the bench before the cause was finally advised.

<sup>2</sup> " 21 May 1605.—An Act of Sederunt was made that no Lord of Session should be an arbitrator."—Forbes' Pref. vii. M. Sup. Vol. It is not in the printed collection.

(*supra* p. 61). This was done in a question with the Heritors of the Canongate, 22 Jan. 1789, A. S. 644. When a quorum of the court remains, a judge will not be allowed to take part in determining the validity of a declinature, on the ground of interest in the cause stated against himself, *Blair v. Sampson*, *supra*. On 1 Feb. 1820, the court passed an act of sederunt, declaring, "that the circumstance of a judge being a proprietor, or holding any shares of the capital stock of any chartered bank in Scotland, is not a ground of disqualification against his lordship judging in a question connected with such bank, or wherein it may have any interest." The principle of this act of sederunt has been held to apply to a near relation of the judge holding shares in other chartered companies, *Speirs v. Ardrossan Canal Co.*, 27 Feb. 1823, ii. S. 252, (N. E. 221); *Friendly Insurance Co. supra*. It had long before been determined that a judge might deliberate and vote in a cause relating to a corporation, of the stock of which he was a proprietor, *Bank of Scotland v. Ramsay*, 12 Dec. 1738, v. Sup. 206; see also *Anderson v. Bank of Scotland*, 31 Jan. 1840, xv. F. 547.

There is a farther ground of objection, by statute, to inferior judges, which is not likely to occur often in modern practice, viz. enmity, or "deidly feid," against either of the parties, 1555, c. 39, (c. 12, Th. Ed. ii. 494); Balf. 340; but this ground of declinator is not held to apply to the judges of the Court of Session, who are not supposed capable of entertaining such feelings, Stair, iv. 39. 14; Tait's MS. "Declinators." A sheriff-substitute may judge in a cause where the sheriff is disqualified on the ground of relationship, *Wallace v. Coquhoun*, 21 Jan. 1823, ii. S. 139, (N. E. 127).

The Judges of the supreme court enjoy a very ample protection in relation to the discharge of their official duties. An



action of damages is not competent, before the Court of Session, against a supreme judge for a censure passed by him while acting in his judicial capacity, on a counsel practising at the bar, and engaged in the cause then before the court,—although it was alleged that the censure had been made injuriously, and from motives of private malice. It was observed on the bench, that the remedy seems to be by complaint to the king in council, or to Parliament, *Haggart's Trs. v. Hope*, 1 June 1821, i. S. 46, (N. E. 49), Aff. 1 April 1824, ii. S. App. 125; see *Allardice, &c. v. Robertson*, 8 April 1830, iv. W. and S. 116.

#### SECT. VII.—SALARIES AND RETIRING ALLOWANCES.

The salaries of the judges were, at the institution of the College of Justice, paid out of the revenues of the church. The payments, however, do not seem to have been very willingly made, 1543, c. 1, (c. 9, Th. Ed. ii. 444). The judges were also entitled to sentence money, amounting originally to 40s. on each decree; but in order to put a stop to obstinate and improper litigation, a fine of five per cent of the sum contained in the decree, where it was for a liquid sum, and of £5, “in all decreitis, consistand *in facto*,” was imposed on the party who lost the action, and made payable to the judges, 1587, c. 43, (c. 24, Th. Ed. iii. 447). This statute was renewed and explained by 1633, c. 26, 1633, (c. 26, Th. Ed. v. 43). Various other provisions were made, for raising a fund for payment of the judges' salaries. See Ersk. i. 4. 37. Sentence money was, however, abolished during the usurpation; and in consequence of this and other causes, the salary of a judge of the Court of Session, at the Restoration, did not exceed £100 sterling. An act was therefore passed, allowing a sum of £12,000 sterling to be levied, the interest of which was to be applied to aug-

menting the judges' salaries, 1661, c. 50, (c. 270, Th. Ed. vii. 250). In the statute immediately following, a farther allowance was solicited from the crown, to be paid out of the Exchequer revenues, with the view of raising the salary of each judge to the sum of £600 sterling per annum. The allowances were increased by various acts of the Scottish and British parliaments. In particular, a large addition was made to them by 39 Geo. III. c. 110, (12 July 1799), § 12. By the act 39 and 40 Geo. III. c. 55, (20 June 1800), the Lord President's salary was fixed at £3000, the Lord Justice-Clerk's at £2400, and the salary of each of the ordinary Lords of Session at £1200. The judges of the Court of Justiciary had £500 per annum additional. By the statute 50 Geo. III. c. 31, (18 May 1810), the salary of the Lord President was raised to £4300, that of the Lord Justice-Clerk to £4000, that of each ordinary Lord of Session to £2000, each of the Lords of Session who were Lords Commissioners of Justiciary, having £600 additional. The act 2 and 3 Vic. c. 36, (29 July 1839), § 12, on the recital of the saving in expense effected in the judicial establishments of Scotland, by the transference of the jurisdiction and duties of the Court of Exchequer, the Admiralty Court, and the Commissary Court, to the judges of the Court of Session, &c., fixes the salaries of the judges as follows:—the Lord President £4800, the Lord Justice-Clerk £4500, and all the other judges £3000, performing, as they now do, the duties of the Court of Session, Justiciary, and Exchequer, and of the Bill Chamber, in the manner mentioned below. See next section.

The judges are farther entitled, on their appointment, to the salary which may have arisen from the death or resignation of their predecessors, in like manner as if their letters patent had been dated the day next subsequent to the day

of the death or resignation of their predecessors, 48 Geo. III. c. 145, (2 July 1808.)

No provision for the payment of any retiring allowance to judges seems to have existed, until the passing of the last mentioned statute, which empowers the Crown to give to any of the judges of the Courts of Session, Justiciary, or Exchequer, an annuity, not exceeding three-fourths of his salary, provided that such person shall have continued in his office for fifteen years, "or shall be afflicted with some permanent infirmity, disabling him from the due execution of his office, which shall be distinctly specified in said grant."

The statute 2 and 3 Vict. c. 36, *supra*, declares "that no retiring allowance or increase of salary shall be received by any judge under this act, unless under deduction of any retiring allowance or salary which such judge now enjoys, or may hereafter enjoy, on account of any judicial office; but such deduction shall be made to the effect only of preventing any of the present judges from receiving larger allowances or salaries than he now receives," § 12.

#### SECT. VIII.—DISTRIBUTION OF BUSINESS OF COURT.

The mode in which the business of the court is distributed among the judges, has undergone many alterations, which it is useless to detail. It will be enough to point out the later and present arrangements. Beginning, then, with the junior Lord Ordinary, or judge who has been last appointed, it was declared, by statute 53 Geo. III. c. 64, (3 June 1813), §§ 2, 3, 4, that he should officiate exclusively as Lord Ordinary on the Bills, and perform the whole business of the bill chamber during session. All remits by the Lords of Council and Session, as commissioners for plantation of kirks and valuation of teinds, to a Lord Ordinary, were also ordered to be made to him; and, farther, all remits by either divi-

sion of the court to an Ordinary, in case of sequestration and bankruptcy, and in such other matters, as to either division might seem proper. In case of his death, resignation, sickness, or necessary absence, the court were authorised to appoint the other permanent Lords Ordinary to officiate for him, weekly, by rotation. It was farther enacted, 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 27, that all rescissory actions, except reductions of decrees of the Court of Admiralty, in maritime causes, should be enrolled, and continue before the junior Lord Ordinary, without being taken by *avizandum* to the inner-house, and thence remitted for discussion.

These regulations are considerably modified by the enactments of the statute 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 1 and 2, the latest on the subject. “The junior Lord Ordinary of the Court of Session for the time, shall act as one of the permanent Lords Ordinary in the outer-house, and shall be on the same footing in regard to the duties of preparing and deciding causes in the outer-house, with the other four permanent Lords Ordinary; and it shall accordingly be competent to enrol causes brought into court, for the first time, before the junior Lord Ordinary in the same manner as before any other of the four permanent Lords Ordinary, and the junior Lord Ordinary shall thereafter proceed in and determine the same in common form: Provided always, that (with the exception as to actions of reduction and teind causes herein-after mentioned) the other duties of the junior Lord Ordinary shall continue as at present: Provided also, that it shall be competent to either division of the court, in case of a pressure of business before the junior Lord Ordinary, to relieve him by remitting the summary causes now in use to be prepared by the junior judge to such of the other Lords Ordinary, and for such time as may appear expedient, or for the courts from time to time to relieve

him of the duty of taking up a weekly roll of new causes for such time as may be thought proper."

"The present practice of enrolling all rescissory actions, or actions of reduction, exclusively before the junior Lord Ordinary, shall be discontinued, and it shall be competent to enrol such of the said description of actions as shall be brought into court for the first time before any of the five Lords Ordinary in the outer-house, who shall severally proceed to prepare and dispose thereof in common form; and upon the occurrence of the first vacancy in the office of any of the present five Lords Ordinary, (an event which has occurred) either by death, resignation, or removal into the inner-house, the second junior Lord Ordinary for the time being shall thereafter be judge in the teind causes, and proceedings which are at present appropriated to the junior Lord Ordinary."

In case of the death or resignation of the junior Lord Ordinary, or on his ceasing to be such, the court was authorised, by 53 Geo. III. c. 64, (3 June 1813), to remit, by act of sederunt or otherwise, the processes depending before him to the judge succeeding him. By 1 and 2 Geo. IV. c. 38, (28 May 1821), § 4, in case of the death, sickness, necessary absence, or legal declinature of the Lord Ordinary on the Bills during the period of the session, but at a time when the court is not actually sitting, it was ordered that any one of the permanent Ordinaries, on a due statement by any of the clerks of the bills, of such fact, and of some urgency in the case, shall and may pronounce on any bill which may, in such circumstances, be laid before him, such interlocutor as the circumstances may require, without prejudice, *quoad ultra*, to the provisions of the above act, and without prejudice to either division, upon legal declinature of the Lord Ordinary of the Bills, when represented to them in any case, to remit the case to another Ordinary in his stead. See farther re-

gulations, by statute 2 Wm. IV. c. 5, (13 Feb. 1832), quoted *supra* p. 54.

Formerly the permanent Lords Ordinary, during session, officiated in the outer-house, each calling the outer-house roll of the week ; and in the rotation of the Ordinaries, an Ordinary of the first division succeeded an Ordinary of the second, weekly ; and the same order was carried on from session to session. On the death, resignation, or removal into the inner-house, of any of the permanent Ordinaries, the court passed an act of sederunt, remitting the processes before his lordship to one of the permanent Ordinaries belonging to the same division ; and it was unnecessary to make any motion, or present any petition for that purpose, 53 Geo. III. c. 64, (3 June 1813), § 12. But by 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 3, 4, this arrangement was altered, and it is declared that the regulation by which each of the four permanent Lords Ordinary is required in rotation to officiate as Ordinary for the week in the outer-house shall be discontinued, and that it shall be competent to enroll, in the weekly printed roll, causes which shall then be brought into court for the first time, before any of the Lords Ordinary, without regard to such rotation ; and it shall be competent to any Lord Ordinary to discharge the duties of Lord Ordinary on oaths and witnesses ;<sup>1</sup> and farther, that the said Lords Ordinary in

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<sup>1</sup> The *Ordinaries on Oaths and Witnesses*, were so called from their being appointed to sit weekly by turns in the outer-house for the examination of witnesses. They had the power of judging in all matters concerning proofs, admissibility of witnesses, &c., 1537, c. 53, (*i. e.* A. S. 1532, § 11, *supra* p. 2, Note 1), A. S. 5 June 1711 ; A. S. 11 Mar. 1800, *in init.* ; 50 Geo. III. c. 112, (20 June 1810), § 30. In our older practice there was another Lord Ordinary appointed weekly in rotation, who examined the processes in which proofs had been taken, and reported a state thereof to the Court. He was called the *Ordinary on Concluded Causes*, A. S. 1 Nov. 1693 ; A. S. 5 June 1711.

the outer-house, shall not be exclusively attached to either division of the court, but shall be attached equally to both divisions; and that the *partibus* written upon summonses, letters, or notes of suspension, advocacy, or other writ, by which a cause shall be originated in the outer-house, shall set forth the particular division of the court to which the cause shall belong; and in the event of the cause being afterwards removed to the inner-house by reclaiming note, cases, or otherwise, it shall be carried to the particular division so set forth, and the division to which the cause is to belong shall be stated in the weekly printed rolls. These enactments are followed up by the act of sederunt passed on 24 Dec. 1838, in relation to said statute:—"When any vacancy shall occur among the permanent Lords Ordinary, by death, or resignation, or removal to the inner-house, there shall not, as heretofore, be successive transferences of the causes depending before the judge who previously officiated in the outer-house, and the junior Lord Ordinary respectively, but the junior judge, in like manner as the remaining Lords Ordinary, shall conduct to a conclusion all the causes, ordinary, as well as summary, then depending before or remitted to him, excepting always teind cases, which, in terms of the 2nd section of the late statute<sup>1</sup> shall be discussed before the second junior Lord Ordinary; and the new judge or judges who may be appointed by her Majesty, shall each in the order of their admission, and without any special remit or act of sederunt, take up the cases that depended before the judge or judges ceasing to officiate in the outer-house; and the new judges shall severally call their rolls on the same days of the week on which their predecessors officiated in the outer-house, but the apartments or bars in the outer-house at present appropriated to the four senior Lords Or-

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<sup>1</sup> 1 and 2 Vict. c. 118, (16 Aug. 1838), *supra* p. 68.

dinary and their clerks, shall continue in future to be occupied by the four senior judges in the outer-house for the time being, and by the clerks to the processes before them, and the junior Lord Ordinary for the time shall, as at present, have right to the apartment of the other judges, alternately on the days allotted to him in the outer-house," § 9.

When, in consequence of the absence of a judge, his roll was called by another Ordinary who pronounced judgment in a case which had been previously remitted to a third Lord Ordinary, the judgment was held null, as pronounced by a judge who had no authority, *Mackenzie, &c. v. M'Leod, &c.*, 20 Jan. 1831, ix. S. 307. A party will not be barred from objecting to the nullity, by having taken steps in the cause before the wrong judge, *Kirk's Reprs. v. Hotchkis and Meiklejohn*, 16 June 1832, x. S. 655; *M'Leod v. Rose*, 29 Jan. 1833, xi. S. 333. When a permanent Ordinary was unable to attend, the court, in a case of urgency, remitted to another Ordinary of the same division to proceed with the case, *Halket v. Rogers*, 27 June 1822, i. S. 530, (N. E. 488), and in *Clarke v. Wardlaw*, 15 Jan. 1845, vii. D. 268, upon a statement by the counsel for the defender, that the Lord Ordinary before whom the pursuer had enrolled the case, was an essential witness for the defender, the court remitted to another Lord Ordinary. In terms of the statute 2 Wm. IV. c. 5, (13 Feb. 1832), § 1, (quoted *supra* Sect. iii.), the court are now in constant use to allow another Ordinary to call the rolls of an outer-house judge who may be indisposed, on such days as may be convenient. Unprinted A. S. 13 Nov. 1841, 11 Jan. 1842, &c. &c.

The judges of the two divisions of the inner-house never officiate at present as Lords Ordinary, except in vacation in the bill chamber. All the judges then, with the exception of the Lord President and Lord Justice Clerk, used formerly to officiate weekly in rotation; but by 2 and 3 Vict. c. 36, (29 July



1839), § 7, it is provided that the whole business of the bill chamber in the Court of Session, falling to be performed during the spring and autumn vacations of the said court, and during the Christmas recess, shall be performed, in such rotation as the Court of Session by act of sederunt may fix, by the six judges of the Court of Session who are not judges in the Court of Justiciary, with power to all the judges in the Court of Session, in case of indisposition or of absence of any of the said six judges, to act for him : and the relative A. S. of 8 Aug. 1839, § 1, declares “ that the six existing judges of the Court of Session who are not also judges of the Court of Justiciary, and all who shall hereafter be such judges of the Court of Session, and not of Justiciary, shall on and after the 12th day of the present month of August 1839, and during all future autumn and spring vacations, and during the Christmas recess, each officiate successively, or by turns, in the bill chamber, and transact the whole judicial business thereof, for the period of fourteen days, the senior of the said six judges officiating for the first period of fourteen days, or that beginning on the 12th day of August current, and being succeeded, on the expiration of the said period, by the next senior of the said judges ; and so on continually, in the order of seniority, till otherwise provided for by Parliament or future act of sederunt : provided always, that, in the event of the death or resignation of any of the said existing six judges, or of the appointment of any of them to officiate in the Court of Justiciary, the judges appointed to succeed to those who may die or resign, and the judges who may be relieved of their duties in the Court of Justiciary, shall begin to officiate in the bill chamber at the commencement of the first period of fourteen days, which shall occur after their appointment as judges, or after their being relieved of their duties in the Court of Justiciary.”

The business of the inner-house consists principally in re-

viewing the interlocutors of the Lords Ordinary. All summary petitions, on whatever subject, except petitions for sequestration, and in one or two other cases, during vacation, must be presented to the inner-house; but in complicated cases, it is usual to make remits to the junior Ordinary, to prepare the causes.

By the 48 Geo. III. c. 151, (4 July 1808), § 3, it was necessary that there should be an equal number of the Lords of Justiciary, including the Justice Clerk, in each division; but this regulation being found inconvenient, (see 11 Mar. 1812, A. S.) was soon repealed, 53 Geo. III. c. 64, (3 June 1813), § 16.<sup>1</sup>

## B—OF THE ADVOCATES.

### SECT. I.—ORIGIN OF THE FACULTY—NUMBER.

LORD BANKTON is of opinion, that of old we had no advocates licensed by public authority; and he seems to think the profession did not exist, until the institution of the Court of Session, Bank. iv. 3. 6. The Faculty of Advocates, probably, dates its origin from this period; but advocates are mentioned as well known, more than a hundred years before, 1424, c. 45, (c. 24, Th. Ed. ii. 8). At the institution of the court, the number was limited to ten; but only eight persons are named as willing and qualified to assume the office. They are required to “procure for everie man for thair waigis, bot giff thai have ressonable excuss,” and they are to be sworn to the faithful and diligent execution of their duty, 1537, c. 65, (*i. e.* A. S. 27 May 1532; A. S. 1532-1553, &c. p. 5).<sup>2</sup> The limitation of the number was not, however, long observed; for we find from the Acts of Sederunt, that in June 1587, there were fifty-four. In 1762, there were two

<sup>1</sup> See in connection with this Section, Sect. iii. *supra* p. 52.

<sup>2</sup> See *supra* p. 2, Note 1.

hundred and ten: in 1794, two hundred and thirty-six; in 1832, about 450, and at present about 430.

#### SECT. II.—QUALIFICATIONS—TRIAL.

Originally no specific qualifications were required; and the judges of the court seem to have been entitled to admit any one they considered fit. But, in 1610, the Faculty lamented “the contempt unto the whilk their calling of advocation whilk was once honorable is brought, and amongst other causes thereof they find the neglect of a just tryall, which is requisite in the most mechanick callings is the principall: the omission quhereof hes produced in a short tyme ane evill which is almost incurable, in such sort that the name and estimation of ane advocat has become vile, and has left the former beauty.” They accordingly made a proposal to the court, which was approved of, that no one should be admitted an advocate, until he had gone through a course of philosophy, and studied law in a university for two years, and should give a proof of his qualifications, or should have served with an advocate of learning and experience, for seven years. It was farther necessary that he should obtain a recommendation from the Lord Advocate to the court. This form of admission was observed for a considerable length of time, Bev. 43. As early as 1619, a thesis was required to be written by the applicant.<sup>1</sup> The examinations at this period were confined to the civil law; *Minutes of Faculty*, 7 Nov. 1664. But if the applicant wished to avoid the examinations

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<sup>1</sup> The authority generally given for this is the A. S. 12 Feb. 1619, (A. S. 1532—1553, &c. p. 75). Its meaning, as usually printed, is not quite obvious. “The Lords ordained that every advocat to be admitted sould give at his admission ane book whilk sould have been erected, the works of any of the Doctors of Lawes, as sould be enjoyned to him be the Dean of Faculty.” On inquiry, the original of this A. S. was found not be extant. The reading in Pitmedden’s MS. in the Advocate’s Library, is the same as that given here.

on the civil law, he might apply to the court, who examined him *in presentia*, as "to his knowledge of styles, the form of process, and of the principles of our law;" A. S. 6 July 1688. This was called the extraordinary mode of admission; and persons nearly related to the judges were prohibited from being admitted in this form, lest the judges should be suspected of undue partiality in their admission, A. S. 25 June 1692. As a farther check, a party who was so admitted paid double fees, A. S. 18 Jan. 1684. But a much more liberal course of study than that indicated by those regulations, was followed by many of our older lawyers; for, after acquiring the learned languages, and the other branches of education which this country then afforded, they repaired to the Low Countries, which have always been famous for learned civilians, and there spent several years in the study of the civil law.

A new form of trial was introduced by A. S. 28 Feb. 1750; and a knowledge not only of the civil law, but of the municipal law and practice of Scotland, is now indispensably required. The applicant must present a petition to the court, stating his wish to become an advocate, and his readiness to undergo a trial. The court remits him to the Dean of Faculty, who again remits him to private examiners. On satisfying the examiners that he is twenty years complete, they examine him on the civil law. If he be found qualified upon this trial, the examiners report to the Dean and Faculty. On the lapse of a full year, he is examined on the municipal law by other examiners. If he acquit himself properly on this second trial, they recommend him to the Dean, who assigns him a title in the civil law, for his public trial. On this title he writes a Latin thesis, which he defends before the Dean or Vice Dean of Faculty at a public impugnation. He used to deliver a Latin speech to the Lords before passing; but, at present, he merely appears

before the first division, immediately on the meeting of the court, and takes the usual oaths, *de fidei administratione*, &c. Subsequently he takes the oath of allegiance, &c., before a Lord Ordinary in the Outer-house.<sup>1</sup>

#### SECT. III.—PRIVILEGES OF THE FACULTY.

An advocate is entitled to plead before every court in the kingdom, superior and inferior, as well as before the House of Peers.

The Small Debt Courts, held by sheriffs and justices of the peace, are, however, exceptions, for no one practising the law is entitled to plead before them, either in writing or *viva voce*, except with leave of the court. Members of the bar, however, seldom plead before an inferior court, except in cases of difficulty or importance. But it is not incompatible with the profession of an advocate to be a notary-public, and many instances of the union of the two offices have occurred; nor to be town-clerk to a city, *Mr. John Orr, Petr.*, 15 June 1781, M. 360.

For more than a century and a half after the institution of the College of Justice, the advocates not only pleaded the causes as at present, but also acted as agents, assisted by their clerks, who were then generally young men training up for the bar, 1672, c. 16, (c. 40. Act of regulations, Th. Ed. viii. 86), § 31; A. S. 26 Feb. 1678.<sup>2</sup> The last rem-

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<sup>1</sup> The form of admission in the early part of last century, will be found, Spotiswood, xxxvi.; Forbes' Preface, p. vii. M. Sup. Vol.

<sup>2</sup> It is generally supposed that the advocates were the only agents in the Court during the whole of this period; but Mr. Tait says, (MS. "Of Agents before the Court of Session),"—"Agents were introduced soon after the institution of the College of Justice—were members of court, and were entitled to its privileges.

This appears from an Act of Sederunt, 13 July 1596, and another, 17 Nov. 1610, for by these, agents are expressly deprived of the above men-

nant of advocates acting in this capacity was abolished so late as 1820, when the mode of calling summonses was altered, A. S. 11 Mar. 1820. Before that time, a summons, on being called, was given out, (as was said), not to the agent for the defender, but to his counsel, and the latter was liable to be summarily apprehended if it was not returned to the clerk in due time. In the case of *Marshall, Pror. Fiscal of the Society of Writers to the Signet v. Youngson*, M. 2426, it was stated by the defender, that between 1725 and 1781 there were no fewer than thirty-nine advocates, many of them of the first eminence, admitted on their own application, procurators of the High Court of Admiralty.

SECT. IV.—AMENABLE TO AND PROTECTED BY COURT.

The advocates are, of course, answerable for their official conduct to the court, and instances are to be found in the Acts of Sederunt, of advocates being suspended from or deprived of their offices, for malversation, 21 Dec. 1649, 26 July 1699, 23 June 1756. In *Hotchkis v. Dickson*, 1820, Bligh, ii. 303, the question was raised, how far the validity of a transaction was affected by one of the parties to it being

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tioned privileges; and orders are given to the macers not to allow agents—or men with Spurs—a strange connection, not being advocates, or advocates' servants—to enter within the bar of the Outer-house.—See also B. S. 11 Jan. 1604.

This is corroborated by the regulations 1672, § 31; and it appears from a decision marked by Fount., 1 July 1697,—that the above article of the Regs. 1672, was at that time in force—and it is observable that there is no mention of agents among the other members of court enumerated in the Act of Sederunt 1681.

By Act of Sederunt 1678, the clerks are discharged to lend processes except to advocates, and their known servants.

At what time it was that agents were again allowed to officiate in court, does not appear."

an advocate, and the general adviser of the other, who was his brother. It is no objection to a judicial sale that the property was purchased by a counsel who had signed *pro forma*, a petition and other papers in the process, *E. of Wemyss v. Montgomery*, 25 Feb. 1824, ii. S. (App.) 1. Advocates are farther enjoined in the Acts of Sederunt, not to lose time with idle discourses; not to interrupt each other, or the judges; and if any pleading was found to be superfluous in its length, the advocate who subscribed it, might formerly be fined. All pleadings must also be drawn with decent and respectful expressions towards the judges and parties, and the advocate who subscribes a paper is answerable for its contents. Although a party may manage his own cause in the Court of Session, as far as oral pleading is concerned, yet every paper lodged in process must be signed by an advocate; A. S. 19 Dec. 1710, 15 June 1738, 5 Mar. 1789, 11 July 1828, § 112; *Hay v. Perth Baking Co.*, 14 Jan. 1823, ii. S. 107, (N. E. 101); *Sassen v. Sir J. Campbell*, 8 Mar. 1831, ix. S. 562; A. S. 21 Feb. 1815. But a representation duly lodged, by inadvertence not signed by counsel, was held sufficient to prevent the interlocutor becoming final; *Macra v. M<sup>r</sup> Kenzie*, 27 Feb. 1824, ii. S. 756, (N. E. 628). A clerk is not at liberty to allow any one, except an agent of court, or one authorized by him, to borrow up a process; A. S. 10 Mar. 1772, p. 576. When advocates plead before an inferior court, the judge may fine them for any indignity offered to him, or he may deprive them of the right of pleading in his court; *Commissaries of Edinburgh v. Russel*, 28 Nov. 1609, M. 341.

On the other hand, it is the duty of the court to protect them in the due exercise of their office, (*ibid.*) and to prevent them from being molested in their right of commenting freely upon the conduct of the parties against whom they may be pleading, and upon the evidence of any witnesses

who may be adduced, in all matters pertinent to the cause. *Falconer v. Keith*, 14 July 1688, M. 344; *Lockhart v. Goldie*, 25 Feb. 1763, M. 359, and A. S. 25 Feb. 1763; *Moodie, &c. v. Henderson*, 9 Dec. 1800, M. 360. See also *Robertson v. Graham*, 18 Nov. 1814, and 5 July 1815, iii. Dow, 273.

In the inferior courts, a procurator generally requires to produce a mandate from the party for whom he appears. An advocate, however, has, by the privilege of his gown, a presumed mandate to appear for all persons within the kingdom without any other mandate; *infra*, P. ii. 1. 7. Even where the party is in England, or in a foreign country, it is unnecessary that counsel should have a special mandate, it being enough that a mandatary has been sisted in the process, and that he be employed by an agent of the Court. Neither would it seem, is the party entitled to prove that he did not in reality give the agent or advocate any warrant to appear for him, his only remedy being an action of damages against the agent for his improper interference; for it has been held a good defence to the advocate, that he appeared *bona fide* on the employment of a practising agent, *Wallace v. Millar*, 31 May 1821, i. S. 38, (N. E. 43).<sup>1</sup>

The mode of obtaining the gratuitous assistance of advocates, by parties on the poor's roll, will be afterwards explained, *infra*, P. iii. 13. 13. But if advocates refuse to plead for any one "on their waigis," (*supra* Sect. i.), the Court will compel them, even under the pain of deprivation; *Lord*

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<sup>1</sup> Counsel have authority to submit a case to a judicial referee. *Forbes v. Lord Duffus*, 19 Jan. 1837, xii. F. 321. See also as to the powers of counsel to bind their clients without special authority, *Ballanden v. Chrystal, &c.* 20 Dec. 1831, x. S. 168. *Gilfillan v. Brown*, 8 Mar. 1833, xi. S. 548; *Gordon v. His Creditors*, 6 Feb. 1834, xii. S. 401; *Currie v. Glen*, 19 Dec. 1846, ix. D. 308, and the older cases, Nos. 1, 7, 14, M. voce Advocate. See farther, *infra*, P. ii. 1. 7, in *init.*, and P. iii. 1, 3, in *fin.*



*Balmerino v. Forrester*, 22 June 1605, M. 341. "And if any advocat, in time comeing, upon the account of personall prejudice, or any other pretence, shall refuse or forbear to consult or concurr in the capacity of ane advocat with any others whom the Lords do or shall authorize to be advocats, they shall be removed from their employments." A. S. 7 June 1677.

#### SECT. V.—FEES.<sup>1</sup>

The "Act concerning the regulation of the Judicatories," 1672, ch. 16, (c. 40, Th. Ed. viii. 80), § 26, &c., contains many anxious regulations for restraining the amount of the fees given to advocates, and for limiting the number employed in a cause; and those enactments are farther enforced by the "Articles of Regulation concerning the Session," 29 April 1695, (A. S. p. 209; Alex. Abridgt. Apx. 129), drawn up under authority of the statute 1693, c. 34, (c. 72, Th. Ed. ix. 330). But those rules have long since fallen into desuetude. It is obvious that as long as the remuneration of lawyers stands upon its present footing, an accurate adjustment of their fees to their labour cannot be expected. It is impossible in many cases to know what is a proper fee, until the business is performed, and the party or his agent often takes a very different view of what is necessary to be done from that acted upon by his counsel. Lord Bankton (iv. 3. 4), says that action is competent for lawyers' fees, though he considers such a proceeding dishonourable, "though action be competent for such gratifications, advocates who regard their character, abhor such judicial claims, and keep in their mind the notable saying of Ulpian, upon the like occasion, *Quædam etsi honeste accipiuntur, inhoneste tamen petuntur*." Now that the pro-

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<sup>1</sup> This and the three following sections are reprinted from Mr. Darling's Work, without any material alteration.

fession of an advocate is followed to obtain a livelihood, as much as the business of a law agent or any trade, it does not seem there is any propriety in placing the remuneration on a different footing. See foot note, xv. S. 748. This opinion is, however, very different from that entertained in quarters entitled to every respect. It has been there held, that the remuneration of lawyers is in a different situation from that of ordinary professional charges, and it has even been said to be a degradation to the bar for a person in the situation of auditor, whose duty it is to check exorbitant charges, and exorbitant expenditure by law agents, to interfere with their fees. It has been said to be the proper course, when an objection is raised to the amount of fees, which have been *bona fide* paid to counsel, that it should be carried not to the auditor, but to the Court for their determination. *Bell v. Caddell*, 28 Jan. 1832, x. S. 265. In practice, however, the auditor does not scruple to cut down fees which appear extravagant.

SECT. VI.—NOT LIABLE FOR INCORRECT ADVICE.

By following the authority of the Roman law, a great anomaly has been introduced into our practice. In Rome, the lawyers or advocates received no fees, and therefore they were justly held not to be responsible for the consequences of any incorrect advice given to their clients; and this rule of the irresponsibility of advocates has been introduced into our law, although, from the earliest times, our advocates have always been fully remunerated for their labour. The members of the other branches of the profession are daily made to answer for any mistake they may commit, and even for the blunders of messengers and others whom they employ, although their remuneration is inferior to that of counsel. There seems, therefore, no intelligible reason why advocates should not be equally responsible; for all professional men

are bound to possess the degree of skill necessary to manage the business they undertake, with safety to their employers. In the present state of the law, an unnecessary expense is incurred in consulting counsel; for the agent often consults counsel not so much to obtain his advice, and that the client may be made more secure, as merely to remove from his own shoulders the responsibility incumbent on him, if he act on his own opinion. In this way, if an error is committed, and the client injured, he has no relief; whereas, if counsel had not been consulted, and if his fees had been saved, the client would, in most cases, have had relief against his agent. But it is settled, that an agent who acts by the advice of counsel, though erroneous, and even contrary to the instructions of his client, is not only safe from any claim of damages, but is entitled to recover from the client the expenses incurred in such consultations, and in the proceedings, though incompetent, which he has adopted in consequence of that advice; *Megget v. Thomson*, 2 Feb. 1827, v. S. 275, (N. E. 256).

#### SECT. VII.—LIBRARY—WIDOWS' FUND.

The Faculty of Advocates possess one of the most valuable libraries in Britain. It was founded in 1682 by Sir George Mackenzie. It now consists of upwards of one hundred and thirty thousand printed volumes, besides about eighteen hundred volumes of manuscripts. It is one of the libraries entitled to the valuable privilege of receiving a copy of every published book, 5 and 6 Vict. c. 45, (1 July 1842), § 8. As a considerable sum is also annually laid out in the purchase of books, this collection must rapidly increase. The faculty have always been remarkable for the liberality with which they have permitted the use of their library to all persons engaged in literary pursuits.

They procured an Act of Parliament in the year 1830, to enable them to raise a fund for their widows.

## SECT. VIII.—CONCLUSION.

The profession of an advocate has always been considered one of the most honourable. Fountainhall, in a pleading for the town of Edinburgh against the College of Justice, regarding the Ministers' Annuities in 1678, calls them "the priests of righteousness and the oracles of the nation," iii. Sup. 258; and there is no employment in Scotland more lucrative to those who reach the head of the profession. Besides, all the judges of the Court of Session and Justiciary, and the sheriffs-depute, must be chosen from this body. On the other hand, there is hardly any employment which is so precarious, or in which so many fail to make a livelihood. A few individuals have always the great bulk of the business, and it is very doubtful if the professional income, even of the practising advocates, was ever in any year equal to their expenditure.

The fees of admission, stamp for commission, &c. amounts to about £330, of which at least two-thirds go to support the library. The Faculty of Advocates has, as far back as can be traced, been considered an incorporation, though no charter can now be found.

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C.—OF THE WRITERS TO THE SIGNET.

## SECT. I.—WRITS PASSING UNDER SIGNET.

This is the most numerous body of law practitioners in Scotland. They were formerly known by the name of Clerks to the Signet, a designation which some of the members of the society still assume. Mr. Erskine (i. 3. 39) considers the signet as the seal of the Court of Session; but this appears an erroneous view, for the signet existed long before the Court of Session

was instituted, and the court has another seal with which reports to the king, &c. are sealed. The latter is the proper seal of the court; see *infra*, P. i. 5, *in fin.* The signet was originally under the sole control of the Secretary of State, and the writs which pass under it are the letters or orders of her Majesty for summoning a party to appear in court, to charge him to obtemper the decree pronounced against him, to prevent him receiving from his debtors his moveable property, or to put an end to his power of disposing of his heritage. These letters seem originally to have been directed to the sheriff of the county where the party resided, but now for a long time they are addressed to messengers-at-arms "as sheriffs in that part."<sup>1</sup> Ever since the Union, the signet has been under the direction of the Court of Session, and that Court has been in use to give orders relative to its management; A. S. 18 Feb. 1718; Ersk. i. 3. 18.

SECT. II.—ORIGIN OF THE SOCIETY—OFFICE-BEARERS.

The writers to the signet were originally the clerks in the Secretary of State's office, who prepared the different writs passing under the signet. In the act 1537, c. 59, (A. S. 27 May 1532, § 18.—A. S. 1532-1553, &c. p. 5),<sup>2</sup> establishing the College of Justice, they are mentioned as a pre-existing body. After the Union, and until about the year 1746, the Secretary of State for the home department continued to name a keeper of the signet; but since that time he has been named by a special commission from the crown; and he appoints a deputy, who has been in use to sit as Chairman at meetings of the society; but whether as a matter of right or of courtesy has not been determined. The point was brought under judicial discussion some years ago, but the process was al-

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<sup>1</sup> "In that part," i. e. *pro hac vice*.

<sup>2</sup> See *supra* p. 2, Note 1.

lowed to fall asleep. He also names a considerable number of the society as commissioners to manage its affairs. The other office-bearers of the society are—treasurer, fiscal, librarian, and collector of the widows' fund. They are elected annually, and it has been the practice generally to re-elect the same person during his life. The professor of conveyancing in the university, is named by two delegates chosen by the society, and two by the town-council of Edinburgh, with the deputy-keeper of the signet. The commission by the keeper to the commissioners authorizes any five of them—the deputy-keeper being one—to take order with all abuses, falsities, and informalities, committed by any member, master, or servant; to punish the same according to the rules of the society; to make new acts and statutes for the good of the calling, and to enforce them under the pain of deprivation, suspension, or pecuniary fines; to make regulations relative to the trial of entrants; and to restrain all persons from exercising the office of writer to the signet if not duly admitted.

The deputy-keeper and commissioners have accordingly, on some occasions, tried the members for delinquencies against the rules and regulations of the society, which every entrant signs at his admission; and have fined, suspended, or deprived the members, according to the nature of the offence. In such cases, the fiscal of the society acts as the prosecutor, and the proceeding is in the form of summary complaint, which is served by the officer; and the proof generally resorted to is the oath of the party. Doubts having been entertained as to the powers of the deputy-keeper and commissioners, the matter was tried in the form of an action of declarator, and the court here were of opinion that the keeper and commissioners had the above powers, *Writers to the Signet v. Graham*, 13 Feb. 1823, ii. S. 214, (N. E. 190), i. W. and S. 538. This case was reversed on appeal, on another ground; but from what fell from Lord Gifford in the

House of Lords, the competency of such proceedings by the deputy-keeper and the commissioners appears very questionable. The society are not entitled to enforce their regulations, by stopping letters at the signet office, *Society of W. S. v. Gairdner*, 21 June 1814, F. C. Nor can the society increase, by its own authority, the legal and established fees of writs passing the signet, *S.S.C. v. W.S.*, 25 Feb. 1800, M. College of Justice, Apx. No. 1.

#### SECT. III.—APPRENTICES—ADMISSION—EXAMINATION.

There is no circumstance which has so much contributed to place the society of writers to the signet in the honourable rank which it has long held, as the attention which has been paid to the education, both general and professional, of their apprentices. There is, indeed, no law association in the kingdom which has shewn so much anxiety on this important subject. It would be a useless task to examine the former course of education. The following rules are now in force :

One applying to enter into an indenture with a writer to the signet, must produce certificates of his having attended two full winter courses at one or other of the universities or colleges—of which certificates, one must be from a professor of humanity;—it being understood that these two courses shall be exclusive of physic, surgery, and divinity, and of the law classes. Or he may produce certificates of his having attended a full course of instruction for seven years, either at the High School or Edinburgh Academy; it being imperative, however, upon every individual, taking advantage of this regulation, to produce certificates, on his applying for admission as a member of the society, showing that he has, during his apprenticeship, or partly during his apprenticeship and partly previous thereto, attended two full winter courses at one or other of the universities or colleges;—of which certi-

icates one must be from a professor of humanity—it being understood that these two courses shall be exclusive of physic, surgery, and divinity, and of the law classes.

Every application, in addition to the particular course of education required by the above regulation, shall specify the general previous course of education of the applicant.

The commencement of the service under the indenture cannot be sooner than on the party attaining the age of sixteen years complete, and the term of endurance is five years. He may thus enter the society shortly after he has become major.

Every candidate for admission into the society must have attended four courses of the law classes—one on civil law, one on Scotch law, and one on conveyancing, with a second course of any one of these. He must, farther, produce certificates of his having regularly attended these classes.

The form of the application is by petition,<sup>1</sup> from the master to whom the apprentice is to be bound, to the keeper and commissioners, to be allowed to enter into indentures with the apprentice. The prayer is granted on the necessary certificates being produced, and the fees to the society paid. When a son serves an apprenticeship to his father, the outlay of the stamp duty on the indenture is saved, an unstamped certificate being used in its place, the father binding himself to relieve the keeper and commissioners of any claim that may be advanced on the ground of evasion of the stamp laws. The indenture, or certificate, must be recorded in the books of the society within sixty days of its date, under certain penalties. The apprentice must truly and *bona fide* serve his master during his apprenticeship; and he must not, during any part of the period, act as an agent or solicitor in any

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<sup>1</sup> The forms of petition may be had at the Signet Office, Register House.



court, supreme or inferior, upon his own account, independent of his master; nor act as a clerk to a lord of session, advocate, extractor, agent, procurator, or solicitor; nor as a clerk in any of the public offices in any of the above courts. He must make oath to these facts before he is taken on trial as a candidate.

Whenever the apprenticeship is expired, and the indenture discharged, a petition may be presented to the keeper and commissioners, to take the candidate on trial. A remit is made to the private examiners, who examine him on the law of Scotland. If the report of the private examiners is favourable, the public trial may be on the elapse of three months. This trial takes place in a room adjoining the hall of the society; and not only the public examiners, but the keeper and commissioners may be present. The public examination is confined, in some measure, to conveyancing, and court practice. The public trials always take place in time of session; and, as both examinations are conducted at some length, and pretty rigorously, no one, who has not a considerable acquaintance with our law, and conveyancing, and also with our forms of process, can hope to get through with any credit.

#### SECT. IV.—FEES OF APPRENTICESHIP AND ADMISSION.

On his admission, the entrant signs the laws and regulations of the society, makes oath *de fidei*, and that he will not reveal the secrets of his employers, as required by the old statute, 1537, c. 59, (A. S. 27 May 1532, § 18.—A. S. 1532-1553, &c. p. 1.)<sup>1</sup>

The expense at present of becoming a writer to the signet is as follows:—The apprentice, on entering on indentures, pays

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<sup>1</sup> See *supra* p. 2, Note 1.

To the library and society funds, £131	3	6	
To the widows' fund, .	50	1	6
Apprentice fee, . . .	150	0	0
Stamp for indenture, .	60	0	2
Fees payable at Signet office, .	2	15	0
	—————	£394	0 2

Entrants again, on their admission, pay

*Fee on passing private trials.*

Treasurer of the society, . £60 1 6

*Fees on passing public trial.*

Stamp for commission, . 25 0 2

Fees at the Signet office formerly  
paid to Keepers, now to Ex-

chequer, . . . 51 8 0

Macers' fees, . . . 3 5 6

————— 139 15 2

—————  
£533 15 4

In addition to the above fees, payable on passing the private and public examinations, there are certain small sums, amounting to £2 or £3, payable at the intermediate stages. These may be ascertained on application at the Signet office. To all this must be added, the dues payable to the widows' fund, dependent on the age and situation of the entrant.

#### SECT. V.—NUMBER OF SOCIETY AT DIFFERENT TIMES.

The number of the society at present is 627. In 1587 there were only 38 members; in 1720, 103; in 1794, 215. The number of apprentices has much decreased of late; on the average of the last seven years it is 10 annually. In 1824,

57 were bound ; in 1829, 38. Formerly only about one-half of the apprentices became members of the society, but the proportion is now larger. The number of entrants varies exceedingly. In 1826, 18 entered; in 1829, 52; in 1830, 20. The average of the last seven years gives 7 annually.

#### SECT. VI.—WIDOWS' FUND—LIBRARY.

In the year 1803, the society obtained an act of Parliament to enable them to raise a fund for the widows of the members. A large fund has accordingly been raised, by payments from the apprentices, and a yearly contribution of £6. 6s. from all the members who have entered since 1803, married or unmarried, and from certain additional rates levied on those who enter the society after they are twenty-four years of age, and on marriages. It was originally intended to give the widows an annuity of £50; but, from the excellent management of the fund, and the great increase of young members, the annuity is now raised to £78. 15s., and there is every prospect of an early increase. There are about 100 widows on the scheme at present. The actual amount of the fund at Whitsunday 1847 exceeded £231,000.

In 1755, the Society commenced collecting professional books; and, in 1778, books in general literature began to be purchased. These collections laid the foundation of the present library of the society, which has rapidly increased of late years, and now consists of from 50,000 to 60,000 volumes. It may be considered the third library in Edinburgh. The Faculty library has an advantage which the Signet library does not possess, that of being entitled to copies of all books entered at Stationers' Hall. The sum expended in books has of late years varied from £400 to £500 annually, being only about one-fourth of the amount formerly expended.

The hall for the library cost upwards of £12,000, and the second floor of the building, formerly occupied by part of the library of the faculty of advocates, was purchased for £12,000.

SECT. VII.—IS THE SOCIETY AN INCORPORATION ?

No charter incorporating the society is extant ; but it has frequently acted as an incorporation. It was found, in the question with the Solicitors, 25 Feb. 1800, affirmed on appeal, *M. College of Justice*, Apx. No. 1, that the society was entitled to all the privileges of a corporation ; and, in a subsequent case, *Gairdner*, 21 June 1814, *F. C. supra* § 2, it was not disputed that it was an incorporation. In a later case, *W. S. v. John Graham*, 13 Feb. 1823, ii. S. 214, (N. E. 190), the court were unanimously of opinion, that their title to be considered an incorporation was indisputable. This case was reversed on appeal, 21 June 1825, i. W. and S. 538, on the ground, that, whether the society was incorporated or not, the action was incompetently brought. It was raised in name of the keeper, deputy-keeper, commissioners, fiscal, and treasurer, not for behoof of the general body, but only in their own names, whereas the society itself, as well as those office-bearers, ought to have pursued. No decision was given in the House of Lords on the question of the body being a corporation ; but, in delivering judgment, the point was adverted to by Lord Gifford, whose remarks were unfavourable to the view that the society is a corporation.

SECT. VIII.—EXCLUSIVE PRIVILEGES.

The society has the exclusive privilege of libelling and preparing summonses which pass the signet on a bill ; and writs passing the signet must be signed by them, except diligences for the citation of witnesses and havers, which are

signed by the Extractor, and commissions and other writs relative to trials by jury, which are signed by the clerks in jury cases, A. S. 16 Nov. 1830; and they are entitled to charge the usual fees for drawing or revising the formal parts of such summonses, &c., for which they are answerable; *S. S. C. v. W. S.*, 25 Feb. 1800, M. College of Justice, Apx. No. 1, Aff. 7 April 1802, *ibid.* In the same case, it was held that they had not the exclusive right to draw bills of advocacy or suspension, nor any authority to increase the established fees of writs passing the signet. They may prohibit their members from entering into any partnership, by which the privileges of the society may be extended to persons not belonging to it, but not as to other matters, *ibid.* The writers to the signet still enjoy the sole privilege of acting as agents in preparing Crown charters, and expediting the relative writs, &c., 10 and 11 Vict. c. 51, (25 June 1847), § 2, &c.

It was long after the institution of the College of Justice before the writers to the signet began to act as agents in the Court of Session. They were repeatedly prohibited from so acting, by their own regulations, as well as by statute 1672, c. 16, (c. 40. "*Regulation of the Judicatories*," Th. Ed. viii. 80), § 31, and by A. S. 26 Feb. 1678. In 1676, three members of the body, Hugh Wallace, John Muir, and George Dallas, were called before the Commissioners to answer for their conduct in exercising the office of agents, "contrary to the acts of the calling," *New Form of Process*, (2d Ed. 1799), 25. It was not till about the beginning of the last century that the regulations, prohibiting them to act as agents, became completely obsolete. But they have now long been the most numerous body of law agents in the court. They also practise in the Court of Justiciary.

A valuable part of their employment is conveyancing, a large share of that department of business being in

their hands. The greater number of the members are notaries public, and all candidates for that office are remitted by the court to the society for examination. At a meeting of the society in 1796, it was resolved, that it was incompatible with the office of a writer to the signet to be a procurator before the Court of Admiralty; but this resolution was overturned by the court; *Marshall, Pror. Fiscal of Society of W.S. v. Youngson*, 23 May 1798, M. 2425. In the discussion of this case, it was admitted on both sides, that a writer to the signet could neither be an advocate nor an advocate's clerk, and that, if he be appointed a clerk of session, he can no longer act in his former capacity of a practitioner in the court. The members have also an extensive business as factors or commissioners, on landed estates.

The writers to the signet are entitled to wear gowns in the court, and did so some years ago, A. S. 23 June 1750; but they are now laid aside. They used formerly to appear in their gowns annually before the judges, to receive any injunctions the court thought proper to give them, as to the execution of their office; and they were generally enjoined to observe the ancient style of writs, the acts of sederunt, and to instruct those under them to behave with honesty and propriety. See A. S. 14 June 1738; 25 June 1760; but this practice has been given up for many years.

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#### D.—OF THE SOLICITORS BEFORE THE SUPREME COURTS.

##### SECT. I.—ORIGIN OF THE SOCIETY, CHARTER OF INCORPORATION, &c.

From the institution of the College of Justice, individuals acquiring the confidence of the litigants, had acted as agents in the court, although the advocates then practised in the

double capacity of counsel and agents. See *supra* p. 76. The attempts of those parties to establish themselves as a separate body, were long resisted by the advocates. During the 17th century, there are on record many efforts of the Faculty to restrain or prohibit other parties from acting as agents or solicitors, and they were successful in procuring various prohibitions by the court to that effect. They had even the influence to obtain the enactment by the legislature, contained in the statute 1672, c. 16, (*supra* p. 76). "In respect, several persons, being neither advocates, nor advocates' servants, do take upon them, under the name of agents, to meddle and negotiate in processes, who are found to be of no use, but burdensome to the lieges; that hereafter all the agents be debarred the house, and not permitted to negotiate or manage processes; and recommends to the Lords of Session to see the same punctually observed."

This regulation was, however, unavailing. The solicitors notwithstanding, with the growing prosperity of the country, continued to increase in numbers and influence,—until at length the business of law-agency was gradually taken out of the hands of the advocates.

Instead of allowing every person at pleasure to assume the name and office of a solicitor, the court ultimately judged it adviseable formally to legalize the office, as distinct from that of an advocate, and to make some provision for ascertaining the qualifications of solicitors. For that purpose, the act of sederunt, 10 Aug. 1754, was passed. At that time three classes of persons were accustomed to act as agents:—

In the *first* place, the clerks or writers to the signet, had, by use or custom, come to assume the office of agents, *supra* p. 92. In the *second* place, the advocates' first clerks or servants continued to retain the privilege which they had obtained under the patronage of their employers, the advo-

cates, *supra* p. 76 ; *infra* p. 98. In the *third* place, the solicitors became a body of practitioners, publicly recognized by the court.

All these classes of practitioners have, as regards the conducting of the law business before the supreme courts, long stood precisely on the same footing, and in all other respects, (except in preparing certain technical writs which pass the signet, including certain diligences, writs relative to Crown charters, &c., *supra* pp. 91, 92),—and they act in common as law-agents, and as conveyancers, notaries public, and factors on landed estates. The act of sederunt, of 10 Aug. 1754, was ratified by another act of 10 Mar. 1772, establishing farther regulations for the admission of solicitors, and committing to them the examination and trial of the qualifications of all persons applying for admission to their body, who were not writers to the signet, or first clerks to advocates.

On the 10 Aug. 1797, the solicitors obtained a charter of incorporation from the Crown, under the great seal,<sup>1</sup> erecting them into an incorporation, with the privilege of suing and being sued, and of holding property in their corporate capacity ;—also, of holding meetings, electing office-bearers, and passing bye laws,—fixing the qualifications of members, their mode of admission, &c. &c.

The society consists of a respectable and numerous body of practitioners, who, besides the duties of conducting a very large proportion of all the law business before the supreme courts, (*viz.* Court of Session, Bill Chamber, Teind Court, and High Court of Justiciary), are extensively employed as conveyancers, notaries, and commissioners on landed estates.

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<sup>1</sup> It is recorded in the Books of the Court of Session, and printed in the Acts of Sederunt, under the date 8 Mar. 1809.



## SECT. II.—QUALIFICATIONS AND MODE OF ADMISSION.

The qualifications for admission, are :—That entrants shall have obtained a classical education,—attended the university, and the law classes, and served an indenture with one of the members for five years, or have been an apprentice or clerk to a writer to the signet, or clerk to an advocate, for the period of five years.

The candidates, before admission, apply by petition to the Court of Session, praying that they may undergo their trials by the office-bearers of the society; and a remit is accordingly made by the court, to the preses, censors, and examiners, who inquire into the character and qualifications of the applicants, and take cognizance by examination, of their knowledge of law and conveyancing, and of the practice before the courts. A report is returned to the court by those office-bearers, and if favourable, the applicant takes, in presence of the court, the oath *de fidei*, and in the outer-house, the oath of allegiance, &c., required by the statute, 20 Geo. II. c. 43, (1747), and his name is thereupon directed to be enrolled in the books of sederunt.

The society has the power, under their crown charter of incorporation, of admitting qualified candidates as members of the incorporation, without any procedure in court. But the above forms of admission have been long followed in practice.

## SECT. III.—OFFICE-BEARERS.—APPRENTICES.

The office-bearers consist of a preses, vice-preses, treasurer, secretary, librarian, examiners, censors, and an officer and gown keeper, who are all elected by the society.

The endurance of indentures is in all cases five years. The apprentice fee is £105, and the stamp £60, as in

the case of writers to the signet. The apprentice must, as already mentioned, have received, either before the date of his indenture or admission, a classical and university education, and must also have attended the law and conveyancing classes.

Upon admission, the members receive commissions, engrossed like those of the writers to the signet, on a £25 stamp, and they pay the same rates of professional tax, viz., £6 for the three first years, and £12 for every other. They likewise pay considerable fees fixed by the bye-laws of the incorporation, as entry-money, and an annual contribution to the general funds of the society, to the widows' fund, and for the support of the library.

#### SECT. IV.—WIDOWS' FUND.—HALL AND LIBRARY.

There has, for many years past, been a widows' fund connected with the society, which has progressively increased in value. It is, however, not compulsory on members to join it. Besides the entry-money exacted from each member of the society, whether joining the fund or not, and a marriage tax, the annual contribution by each subscriber to the fund is £5. 5s.

The society have a hall in the Parliament House, and a library of books in law and general literature, of considerable extent and value.

#### SECT. V.—CONCLUSION.

The members of the incorporated society at present consist of upwards of one hundred. Many of them have been and are co-partners in business with writers to the signet. As already mentioned, they carry on the same business,—as law agents, practising in all the supreme courts, and as conveyancers, commissioners on landed estates, and notaries'

public. Probably the largest share of the judicial business before the supreme courts is carried on by the members of the society of solicitors. They are eligible for the office of auditor of court, presenter of signatures, sheriff-substitute, principal extractor of the decrees of court, and for a variety of other situations connected with the courts of law. It has been doubted if the solicitors are members of the College of Justice,—but see *Macintosh v. Brodie*, 17 June 1826, iv. S. 729, (N. E. 736); *Bruce v. Clyne*, 24 Jan. 1833, xi. S. 313.

By a royal grant, the members of the society are entitled to wear gowns while attending their duties in court,—but they are not in the habit of doing so.

#### E.—ADVOCATES' FIRST CLERKS.

It is probable that advocates' first clerks, who, in our older practice, were generally young men studying for the bar, originally confined themselves to their duties of clerks, in assisting their masters in the management of cases, and did not act as agents in their own right. Their successors, however, have done so for a very long period; and we find them recognised as agents by A. S. 10 Aug 1754. An advocate's first clerk cannot act as an agent, until he produce a certificate from a practising member of the bar, bearing that the party is his clerk; and a roll of the names is to be kept, A. S. 10 Mar. 1772. The form of admission is regulated by a Report of a Committee appointed by the Faculty in 1836. The candidate must have passed three years as a clerk in the office of a procurator in the inferior courts, and three years as second clerk to an advocate, or as clerk to an agent in the Court of Session; or have acted for five years as second clerk to an advocate, or as clerk or apprentice to an agent in the Court of Session. He must also have attended

the classes of Scotch law and conveyancing<sup>1</sup> one session at least. He passes an examination on Scotch law and the Forms of Process. These parties form a society, but have never been erected into an incorporation. They are members of the College of Justice, and entitled to all its privileges. It has been lately decided in the Court of Exchequer, that they must pay the stamp on admission, under the 55 Geo. III. c. 184, which they had not previously done.

**F.—RIGHT OF SOLICITORS AT LAW AND ADMIRALTY PROCURATORS, TO PRACTISE IN COURT, &c.**

The incorporation of solicitors-at-law are not entitled to practise before the supreme courts; but, in consequence of the transference of the jurisdiction of the Commissary and Admiralty Courts to the Court of Session, the solicitors who were practising in the Commissary Court prior to 23 July 1830, were empowered to conduct in the Court of Session, such proceedings as had formerly been carried on before the Commissary Court; 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), § 39.

The procurators before the Admiralty Court were still farther favoured, and were allowed, during their respective lives, to “conduct, as agents, before the Court of Session, all or any causes and proceedings whatsoever, which are, or may be, competently heard and determined before that court,” § 28.

The act of sederunt 21 Dec. 1833, referring to these clauses of said statute of 1 Wm. IV., declares, that whereas it has from time to time been found “necessary to pass regulations, in order to prevent unqualified persons from practising as

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<sup>1</sup> If he chooses he may attend a course of the Juridical Society's lectures in place of the University course of conveyancing.—*Resolutions of Faculty, March 1847.*

agents or solicitors in the Court of Session, notwithstanding whereof several individuals have of late taken upon themselves to do so :—

“ Therefore, and for the prevention of all such abuses in future, the Lords do hereby enact and ordain, that there shall, on or before the 1st day of February next, and annually on or before the 5th day of December in each year thereafter, be delivered at each of the offices of the principal and depute clerks of court, and at the bill chamber, and to each of the keepers of the rolls of the respective divisions of the inner-house, for the use of the court :—1st, A copy of the list now in use to be printed, of the society of writers to the signet. 2nd, A list of the incorporated society of solicitors before the supreme court, certified by their secretary for the time. 3d, A list of advocates’ first clerks entitled to practise as agents,—specifying, after the name of each individual, the name of the advocate whose certificate he holds, in terms of the act of sederunt 11th March 1772; said list to be certified by the keeper of the record, or roll of practising clerks, kept by the Faculty of Advocates. 4th, A list of all persons who were entitled, as on the 23d day of July 1830, to conduct cases as procurators before the High Court of Admiralty, and who may still be alive. 5th, A list of the incorporated solicitors before the Consistorial Court of Edinburgh, as at the 23d day of July 1830, who may be still alive, and who are entitled to act as agents in Consistorial causes before the Court of Session. The said two last mentioned lists (4 and 5), to be certified by the clerk or secretary to those two bodies respectively for the time, and to specify also such of the members thereof, as may belong also to the society of writers to the signet,—the incorporated solicitors before the supreme courts,—or the body of advocates’ first clerks,—entitled as such to practise as agents or solicitors in the Court of Session.

“ That the five several lists above mentioned, shall also be authenticated by the signature of the presiding officer of the respective bodies for the time.

“ Farther, considering that instances have of late occurred where individuals who were not entitled to practise in this court, or in the bill chamber, either from not having been duly admitted as agents or solicitors, or from not having been practitioners before the High Court of Admiralty, or the Consistorial Court of Edinburgh, as at 23d July 1830, or from having failed or neglected to purchase attorney licences in terms of law,—have presumed to conduct business for their own behoof and advantage, in the names of agents or solicitors who were duly qualified to practise,—the Lords do hereby declare, that they will visit all such practices in future with the severest penalties, and most rigorous punishment ; and that, if any writer, solicitor, or agent, shall presume either to authorise, or permit his name to be used by any unqualified person or persons, as above specified, he shall be forthwith dealt with as guilty of a contempt of court ; and on the fact being established, shall be suspended from the rights and privileges of an agent or solicitor for such period as the court may think proper, not exceeding one year from the date of conviction.

“ And farther, the more effectually to check and put a stop to such abuses, it is hereby enacted, that no person shall be entitled to borrow up processes or papers, either at the offices of the clerks of court, or at the bill chamber, except those who are legally entitled to act as agents or solicitors in this court, their clerks and apprentices ; nor shall the clerks of court, or of the bill chamber, lend papers or processes to any other ; and that it may be known who are really and *bona fide* their clerks and apprentices, each person entitled to act as agent or solicitor, shall immediately after the passing of this act, give in to each of the clerk's

offices, and to the bill chamber, a signed list of the names of those who are his clerks and apprentices, and for whom he shall be answerable ; and when any of those contained in the list shall leave his service, he shall, within three days at farthest, notify the same at each of the clerk's offices, and at the bill chamber, that his name may be expunged from the list."

By § 3 of 6 and 7 Wm. IV. c. 41, (28 July 1836), all agents duly qualified to practise in the Court of Session, are allowed to practise in the sheriff court of Edinburgh, in so far as relates to any of the proceedings which are transferred by the act to the sheriff, on the abolition of the Commissary Court of Edinburgh. By § 21 of 6 and 7 Wm. IV. c. 56, (13 Aug. 1836), Court of Session agents may practise as agents in all sheriff courts, in so far as relates to any of the proceedings (*Cessios*) which are authorized by the act to be carried on before sheriffs, provided they shall not be entitled to higher fees than the other agents in such courts. See also as to to *Sequestrations*, 2 and 3 Vict. c. 132, (17 Aug. 1839), § 132, and *Services*, 10 and 11 Vict. c. 47, (25 June 1847), § 31.

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## CHAPTER IV.

### OF THE OFFICERS OF THE COURT.

#### SECT. I.—PRINCIPAL CLERKS.

The number of the Principal Clerks of Session has varied at different times, A. S. 28 and 29 June, and A. S. 3 July 1621, (A. S. 1532—1553, &c. 76), A. S. 11 Jan. 1604 ; A. S. 20 June 1676, following upon a letter regarding the clerks, from Charles II. By statute 1685, c. 38, (c. 47, Th. Ed. viii.

487), it was ordered, in substance, that they should not exceed six in number, and they so continued till of late years. They were divided into three chambers. In the year 1676, the nomination of the clerks was conferred on the court, and the number was reduced to three, A. S. 20 June 1676. In 1680, the nomination was restored to the Lord Clerk Register, A. S. 8 June 1680; and three conjunct clerks were subsequently added to those in office. The division of the clerks into three chambers, was, however, kept up till lately; and the three offices or closets were distinguished by the names of the clerks at the Revolution,—Durie, Mackenzie, and Dalrymple. Each chamber consisted of two principal clerks, two depute clerks, and four assistant clerks or closet keepers, one-half for the first, and the other half for the second division; see Bev. 66, and Apx. 41. The principal clerks are now reduced to four in number,—two for each division of the inner-house, who, in addition to the duties heretofore discharged by the principal clerks of Session,—in terms of later statutory enactments uniting the Jury Court with the Court of Session, and reducing the number of clerks on the bills,—perform the duties connected with trials by jury and bill chamber proceedings in the inner-house, 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), § 13; 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 5, 6, 7, (*infra*, Sects. iii. iv). “In case of absence from necessary cause of any principal clerk, his duties may be discharged by any of the remaining principal clerks, or by any person appointed by the division of the court to which such principal clerk may belong, either from among the assistant clerks in the inner-house, or the depute clerks in the outer-house; and all interlocutors which have been, or shall hereafter be written by any such persons so appointed and acting under the authority of the court, being duly signed, shall be, and they are hereby declared to be valid and effectual, any law or practice to the contrary notwithstanding.” 1 and



2 Vict. c. 118, § 8. The principal clerks must be advocates, or writers to the signet, of three years standing, Reg. 1695, § 10, A. S. i. p. 211, (Alex. Abridgt. of A. S. Apx. 131). A form of trial at their admission will be found in A. S. 2 June 1697.<sup>1</sup> Their nomination has been in the crown since the year 1728, when the patronage was reserved in the appointment of the Lord Register, and has been so ever since.<sup>2</sup>

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<sup>1</sup> The form of trial contained in the Act of Sederunt, quoted in the text, is now considered to be entirely obsolete, and inapplicable to existing arrangements; but the practice in regard to the trials of the principal clerks may be stated as follows :

1. The clerk-probationer, after presenting his commission, (which the court order to be inserted in the books of Sederunt), takes his seat at the clerk's table,—attends to the *viva voce* pleadings in an ordinary action *put out for the purpose*, in which the record has been closed, and a copy furnished to the clerk. He takes short notes or minutes of the debate, sufficient to assist his own memory in stating the pleas of the respective parties, and afterwards framing an Interlocutor on *either* side, as the court may determine.

2. When the debate is finished, the clerk reads or states to the court very briefly the substance of the debate. Their Lordships having expressed their approbation of this part of the trial,—then

3. Deliver their opinions on the merits. Of these opinions the clerk also takes short notes, simply to assist himself in preparing an Interlocutor to suit the decision *pro* or *con*. The Interlocutor is then sketched and read by the clerk-probationer to the Lords. Of this, they also approve ; but the probationer not being yet admitted, the Interlocutor must be extended by the clerk to whom the cause belongs, for signature of the President, or it may be written by the clerk-probationer after admission.

4. A cause, (suspension, or advocacy, or petition and answers, the papers having also been previously furnished), is next pleaded at the bar, and the same procedure takes place as in the ordinary action.

5. The trials being thus ended, the clerk takes the oath *de fideli*, and subscribes the oaths to Government in open court. After this his Gown is put on by a Macer ; obeisance is paid to the Bench, the Bar, and Practitioners, and the clerk takes his seat at the table as duly admitted.

<sup>2</sup> The Lord Clerk Register is emphatically the head or chief clerk of

Their principal duty is to write out the interlocutors of the Inner-house, two of them officiating in the first, and two in the second division. The act 1 and 2 Geo. IV. c. 38, (28 May 1821), § 19, declared that they should be bound as heretofore to exercise a constant superintendence regarding the official conduct of the Extractors, (then nominated by the principal clerks). and all other subordinate officers in their department, and, for that purpose, that at least one of them should attend personally at such time as should be necessary, at least thrée days in every week at the Register Office ; and they were also ordered to prepare and deliver to the Lord Register or his Deputy, at the commencement of every winter and summer session, a report, setting forth such matters as had occurred worthy of notice for the public benefit. The late regulations as to the nomination of the extractors, and the superintendence of the junior principal clerk, will be found below, Sect. vi.

It is also part of their duty, to receive the bonds of caution for factors and curators, named by the court, in rankings and sales, &c. ; and other bonds of caution ordered by the inner-house not in the bill chamber.

They receive a salary of £1000 each, payable quarterly, and are not entitled to any fees, 50 Geo. III. c. 112, (20 June 1810), § 16. The clerk to king's processes was enti-

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court, or Clerk Register of Council and Session, and as such, has been clerk or keeper of their Lordships' books, from the very origin of the court. The clerks of court were his deputies, as well as the clerks of Parliament, Exchequer, &c. Accordingly, after the right was reserved to the Crown in 1728, to name clerks of the Court of Session, the Lord Clerk Register continued to grant commissions to the principal clerks, authorizing them as his deputies, to authenticate and issue extracts of deeds, &c., and this power continued until 1821, (1 and 2 Geo. IV. c. 38, §§ 17, 24). The principal clerks are still the Lord Register's deputies at the elections of the Representative Peers.

tled to an additional salary of £40 per annum, *ibid.* But this office is now abolished, and processes conducted on behalf of her Majesty are under the care of the clerks of Session generally, 1 and 2 Vict. c. 118, (16 Aug. 1838), § 9.

#### SECT. II.—DEPUTE CLERKS.

There are now five depute clerks of Session, one with his assistant, (see next Section), attached to the bar of each of the Lords Ordinary, 1 and 2 Vict. c. 118, (16 Aug. 1838), § 12. Their duty is to write out the interlocutors in the outer-house, and to take a general superintendence of the office, and afford advice to the assistant in cases of difficulty. —*See Law Report*, 1834. Their salary is £400; and they are not entitled to any fees, 1 and 2 Vict. *supra*. The depute clerk to king's processes had an additional salary of £10 per annum, 50 Geo. III. c. 112, (20 June 1810), § 16, but this office is now suppressed, *supra* Sect. i. They are nominated by the crown, 11 Geo. IV. and 1 Gul. IV. c. 69, (23 July 1830), § 14, and 1 and 2 Vict. c. 118, (*supra*), § 12.

#### SECT. III.—ASSISTANT CLERKS, OFFICES, CLERKS' MARKS.

Each of the principal and depute clerks has an assistant. His duty is,—to take charge of the processes in his office; to attend there to receive papers; to authenticate, mark, and inventory them when given in; to lend out and receive back processes; to keep a minute-book of the acts and proceedings which have taken place in the processes under his charge; and to attend the court while sitting. The assistants of the depute clerks have also to assist in writing out the interlocutors of the Lords Ordinary. Till the statute 1 and 2 Vict. c. 118, *supra*, they had no salaries, but were paid by fees on the lodging, borrowing, and returning of processes and papers, and on other judicial proceedings. By that act, the

remuneration of each assistant, both in the inner and outer house, is fixed at £350 per annum, §§ 10, 13; and the assistant clerks, both in the inner and outer house, are prohibited under a severe sanction, (§ 30), from charging or receiving any fees, except for copies of interlocutors, or other papers ordered or required, for which an allowance shall be paid at the rate of fourpence for each page of one hundred and fifty words; and sixpence for each page of states or schemes in figures, without any other charge for stationery: Provided always, that where, upon remit from the court or Lord Ordinary, any of the said depute or assistant clerks shall be directed to make investigations, and prepare any report, calculation, or state, the charges thereof shall be regulated by the time and labour in each particular case, and shall be in all cases subjected to the review and taxation of the auditor of court; and the emoluments arising from such employment shall be paid into the Fee Fund. Each principal and depute clerk formerly nominated his own assistant; but, by a general provision in 11 Geo. IV. and 1 Wm. IV. c. 69, *supra*, the appointments of depute clerks and of assistant clerks of Session were vested in the crown. The Jury Court being now amalgamated with the Court of Session, the charge of proceedings in jury causes in the outer-house, (till the remit to the issue clerks), is devolved upon the depute clerks and their assistants, as upon the principal clerks and their assistants in the inner-house, in the manner pointed out in the statute, 1 and 2 Vict. c. 118, §§ 7, 12, *supra*, and relative A. S. 24 Dec. 1838, §§ 7, 8.<sup>1</sup>

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<sup>1</sup> Although the Jury Court is now amalgamated with the Court of Session, yet the proceedings are distinct, after cases are transmitted to the issue clerks for the preparation of issues. After they are so transmitted, in terms of the said act of the Queen, all proceedings and mo-

Each of the principal and depute clerks has an office in the Register House, in which the assistants attend. While the division of the clerks into chambers (*supra* Sect. i.) existed, the four offices of the clerks, forming Durie's office, were situated in the upper flat of the south-west part of the Register House. Those forming Mackenzie's office, were immediately below; and the remaining four, forming Dalrymple's office, occupied the south-east part of the house, on the ground flat.

Every paper lodged with the clerks is marked with one or more letters, to distinguish it from the papers of the other offices. Prior to the changes introduced by the statute 1 and 2 Vict. c. 118, (16 Aug. 1838), and relative A. S. 24 Dec. 1838,—in the inner-house, the paper was marked generally with the initial of the surname of the principal clerk to whom the office belonged, and sometimes the initial of the conjunct clerk in the same chamber was added. In the outer-house, there were three letters. The first was the initial of the senior principal clerk of the chamber; the second, the initial of the junior principal clerk; and the third, the initial of the depute clerk, to whom the office in which the paper was lodged belonged.

By § 10 of the above mentioned A. S., the principal clerks were ordered to settle the office marks or letters to be used by the clerks of the inner and outer house, to identify and authenticate papers, and to intimate their regulations to practitioners.

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tions therein are attended by the assistant clerk in jury causes before the respective Lords Ordinary transmitting the cases, and if before the divisions, by the principal clerks of Session. Until the issues are prepared, the processes are under the charge of the assistant clerk of the issues, and when finally adjusted, are transmitted to the Jury Office in the Register House.

*The Marks now in use are as follows :—*

In Lord Cuninghame's causes,—R. B. (the initials of Mr. John Russell, P. C. Second Division, and Mr. Thomas Beveridge, D. C. at Lord C.'s bar). In inner-house, First Division W; Second Division R.

In Lord Murray's causes,—W. B. (the initials of Mr. James Walker, P. C. First Division, and Mr. Thomas Bruce, D. C. at Lord M.'s bar). In Inner-house, First Division W; Second Division R.

In Lord Ivory's causes,—T. H. (the initials of Mr. Thomas Thomson, P. C. Second Division, and Mr. John Hay, D. C. at Lord I.'s Bar). In Inner-house, First Division, L; Second Division T.

In Lord Wood's causes,—R. W. (the initials of Mr. John Russell, P. C. Second Division, and Sir James Wemyss, D. C. at Lord W.'s bar). In Inner-house, First Division W; Second Division R.

In Lord Robertson's causes,—L. N. (the initials of Mr. John M. Lindsay, P. C. First Division, and Mr. Peter Nimmo, D. C. at Lord R.'s bar). In Inner-house, First Division L; Second Division T.

In Inner-house cases, the papers are marked with the initial letter of the surname of the clerk to the process.

SECT. IV.—CLERKS OF THE BILLS.

By 50 Geo. III. c. 112, (20 June 1810), § 44, it was enacted, that from and after the passing of that act, there should be two principal clerks of the bills and two deutes, the latter to be appointed by the principal clerks jointly, and in case they could not agree, the Lord President to have the casting vote.

Subsequently, no person could be appointed a principal clerk of the bills unless he were a principal clerk of session ;

and the two principal clerks of the bills were not to be appointed from the same division of the court; 1 and 2 Geo. IV. c. 38, (28 May 1821), § 8.

But by the 1 and 2 Vict. c. 118, (16 Aug. 1838), § 14, the offices of the whole of the clerks in the Bill Chamber, connected with Bill Chamber procedure, were abolished, and two clerks of the bills authorized to be appointed by the crown. These officers, "under the principal clerks of session," have the whole charge of the Bill Chamber department. They receive as clerks of the bills a salary of £250 each per annum, and are prohibited from receiving any fees, except for copying papers ordered from them. The fees of consigned money, and interest during the period of consignment, are abolished. They are responsible for the reputed solvency of cautioners, and for consigned money, as their predecessors were, and must find caution as the court shall direct.

The duty of the clerks of the bills consists in receiving and laying before the Lord Ordinary on the bills, all notes (formerly bills) of suspension and advocacy; in receiving the cautioners offered for the suspenders, when caution is required; in attending the court when cases are reported by the Lord Ordinary, &c.

They also lay before the Lord Ordinary bills for loosing arrestment, and receive the bonds of caution lodged for the applicant; they pass all bills for hornings and captions, and write the "*fiat*" for personal execution, under the statute 1 and 2 Vict. c. 114, (16 Aug. 1838). They also examine and pass all bills for arrestments, lawburrows, &c., and receive the bonds of caution and bills of suspension in the latter diligence. By the Bankrupt act, 2 and 3 Vict. c. 41, (17 Aug. 1839), § 19, the bill chamber clerks are appointed clerks to sequestrations, keep the register of these proceedings, and transmit all deliverances on petitions for sequestration to the keeper of the minute book for insertion

therein. By A.S. 24 Dec. 1838, (*Proceedings in Bill Chamber*), § 14, the two clerks are authorized to divide or arrange, under the direction or approbation of the Lord Ordinary on the bills, the duties to be performed by each respectively. These arrangements are ordered to be published on the walls of the bill chamber, and each of the clerks is declared responsible only for the caution which he himself may receive. The register of abbreviates of adjudications was formerly kept in the bill chamber. But by 1 and 2 Vict. § 14, it is declared, that, upon the failure of the then keeper of the register of abbreviates of adjudication, (an event which has now occurred), the office shall be abolished, and the duties thereof performed by the keeper of the register of hornings and inhibitions, in such manner, and under such conditions and regulations, as the Home Secretary shall direct.

#### SECT. V.—JUDGES' CLERKS.

Each of the judges has a private clerk. His duty is to take charge of the papers of the judge, &c., (4 July 1810, A. S.) The clerks of the Lord President and Lord Justice-Clerk are also keepers of the inner-house rolls of the first and second divisions respectively, in virtue, however, of a separate commission from the court; A. S. 15 Jan. 1788, 14 Nov. 1789, &c. The clerks of the other judges, who are not permanent Ordinaries, take charge of the weekly roll of new causes originating in the outer-house, commonly called the outer-house printed rolls, *infra*, P. ii. 7. 1.; 1 and 2 Geo. IV. c. 38, (28 May 1821), § 16. Those of the Lords Ordinary in the outer-house take up the roll of the causes in which motions are to be made, or debates to be heard, usually named "the hand rolls" of these judges respectively, (*infra*, P. ii. 7. 2.) and write the interlocutors pronounced by the judges on processes at avizandum. They have also



to receive from the clerk such processes as are sent to avizandum, and return them when advised. They attend the Lord Ordinary in court. Each judge nominates his own clerk. By the statute last quoted, §§ 14, 15, the salaries of the keepers of the inner-house rolls, and clerks of the Lord President and Justice-Clerk, were fixed at £500 each; those of the other clerks at £300 per annum. Besides, an annual allowance of £100 was granted for each of the clerks of the Lord President and Justice-Clerk, and of £50 for each of the clerks of the other judges, to be set aside to provide liferent annuities, payable to the clerks on the death or resignation of the judges to whom they are respectively attached. But by the act 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 16, 17, the salaries of the two former are reduced to £400 each, and those of the Ordinary judges to £200, with an addition of £10 per annum to the salaries of these latter respectively for each year of their service, till such salaries shall amount to £300 per annum to each of them who shall have served as such for ten years. The annuity fund above alluded to is abolished, but equivalent annuities are provided out of the public revenue. These clerks are not entitled to any fee or emolument whatever. The assistants of the clerks of Session and the Lords' clerks are prohibited from acting as agents, except in their master's causes and their own; A. S. 28 Nov. 1682, and 7 Nov. 1690, *in fin.*

#### SECT. VI.—EXTRACTORS.

The Extractors, whose duty it is to extend in due form the decrees of the court, and give out the same, have been put upon a new footing by the act 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 18, 19. Formerly they were four in number, nominated by the principal clerks during pleasure, the senior clerk having a casting vote, in case of equality. Each had

a salary of £250 per annum. They were under the direction of the principal clerks of session, who were responsible for the proper discharge of their duty, and to whom they found security on their appointment, 1 and 2 Geo. IV. c. 38, (28 May 1821), §§ 19, 20. But by the above statute (1 and 2 Vict.) the duty is now placed in the hands of one principal extractor, appointed by the crown, who shall not practise in the Court of Session, nor hold any other official situation, and shall perform the duties of the office in person, with the aid of an assistant, nominated by himself, who, during his necessary absence, is empowered to subscribe and authenticate the extracts. It is provided that the junior principal clerk of session, for the time being, shall superintend the preparation of extracts, and the extractor is bound to comply with his instructions. The said principal clerk from time to time, and as he may think proper, and, at any rate, fourteen days before the termination of each session of the court, must report how far the duties of the extractor and his subordinates, the assistant and engrossing clerks, are properly discharged. The salary of the principal extractor is £500, and that of the assistant extractor £300, and participation in the charges for copying by the engrossing clerks in the office, by either the principal or assistant extractor, shall be held a malversation in office. By the statute 50 Geo. III. c. 112, (20 June 1810), the ancient form of full extracts, of which Lord Stair, iv. 46. 27, so bitterly complains, was abolished, and forms much simplified and abridged were enjoined. The practice, however, continued much the same as before, and it was not till the passing of the statute of Victoria, and the appointment of the present principal extractor, that the regulations of the 50 Geo. III. received full effect. The length of the extracts has been very greatly diminished, and a corresponding saving of expense effected.—*Statutory Reports of Junior Principal Clerk in Books of Sederunt.*

SECT. VII.—KEEPER OF THE REGISTER OF DEEDS AND  
PROTESTS, AND PROBATIVE WRITS.

Formerly a deed might have been given in for registration in any of the offices of the principal clerks, as deputies *quoad hoc*, of the Lord Register, and three registers of deeds were kept. By 55 Geo. III. c. 70, (7 June 1815), §§ 1, 4. &c. it was enacted, that only one register should be kept, with one principal and two assistant keepers, who are bound to perform their duties in person; and these officers are appointed to authenticate the extracts of deeds, &c. by their subscription; 1 and 2 Geo. IV. c. 38, (28 May 1821), § 26. They are nominated by the Lord Clerk-Register, and are under his immediate control and direction; *Ibid.* They are paid by a certain proportion of the fees of recording the deeds; see 50 Geo. III. c. 112, (20 June 1810), schedule, and 55 Geo. III. *ut supra*.

SECT. VIII.—OFFICE OF KEEPER OF THE RECORDS OF THE  
COURT OF SESSION, NOW ABOLISHED.

This office was created by the 55 Geo. III. c. 70, (7 June 1815), and placed in the gift of the Lord President, and the keeper held his office *ad vitam aut culpam*. By this statute the clerks of Session, and their assistants and extractors were appointed, on the 15th of April and 15th of August yearly, to transmit all concluded and extracted processes to the keeper of the records, to be arranged by him in a series until transmitted to the General Register House.<sup>1</sup>

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<sup>1</sup> The processes remained in this intermediate office for five years, in order that the extractors might, during that period, have access to the records, in the event of *second* extracts being required. The Law Commissioners in 1834 suggested, whether it might not be proper that the

By 1 and 2 Vict. c. 118, (16 Aug. 1838), § 20, this office was abolished, and its duties transferred to the principal extractor and his assistants, (*supra* Sect. vi.), with the aid of a clerk if required, who shall receive a salary not exceeding £100 per annum, as shall be fixed by the principal extractor. The keeper of the records of the Court of Session was also keeper of the records of edictal citations, publications, charges, &c. under the regulations of the 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 50. The act appointed three separate registers, to be kept for these edictal proceedings, and the salary was £380. This office is now conjoined with that of keeper of the minute book; next Section.

SECT. IX.—KEEPER OF THE MINUTE BOOK AND RECORD OF  
EDICTAL CITATIONS.

The minute book being intended for notification of the proceedings to the practitioners in court, was anciently read aloud in the outer-house by the clerk every day, before the Lord Ordinary left the bench. This custom fell afterwards into disuse, and the practice was to send the book to the agents' houses for their perusal; A. S., 8 Nov. 1649; *New Form of Process*, (2d Ed. 1799), 311. Practitioners are now made aware of its contents in the way to be immediately mentioned.

The duties of the keeper of the minute book are to collect into one minute book the names, &c. of parties in all acts and decreets pronounced in court, which he transcribes from the different minute books kept by the assistant clerks in the inner and outer house, and by the bill chamber clerks; to insert in it the protestations (*infra* P. ii. 4. B.) and other

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warrants should be transmitted annually, but it was not considered expedient to make any change in the statute which followed, 1 and 2 Vict. c. 118.

judicial intimations lodged with them; to superintend the printing and circulation of it, and to score the protestations, or give them out to be extracted, as the case may require.

By 1 and 2 Vict. c. 118, (16 Aug. 1838), §§ 21, 22, it is enacted, that the offices of keeper of the minute book, and keeper of the record of edictal citations, shall, upon the death, resignation, or removal of the present incumbents, be conjoined, and the duties thereof performed by one officer, who shall be appointed by her Majesty, her heirs and successors; and these duties shall be performed by the holder of the said offices in person, with the aid of a clerk to be appointed by him; and such officer shall receive a fixed salary of £300 per annum, and his said clerk shall receive a salary of £130 per annum; and such salaries shall be in lieu of all fees or perquisites, and of profits arising from the sale of the minute book or otherwise: Provided always, that in order to bring the conjunction of the said two offices the sooner into effect, it shall be lawful to the commissioners of her Majesty's treasury, or any three of them, to make such arrangement with the present holders of the said offices, and to award to either of them who shall resign his office, such compensation, not exceeding the amount of his present salary and emoluments, as to the said commissioners shall seem proper. These changes have been now sometime in operation.

It is ordered by § 22, that the minute book of the Court of Session and Teind Court, the record of edictal citations, the weekly calling list of causes, and the weekly printed roll of outer-house and teind causes, shall be printed by the respective keepers thereof, and shall be sold to the public at the lowest rates which will defray the necessary expense of printing the same; and such keepers shall annually exhibit an account thereof to the auditor of court, who is authorized to examine and audit the same: Provided always that the said court may regulate the mode of such sale, and by whom the

same shall be made, and the proceeds thereof accounted for; and in case such sale shall be insufficient to defray the expense of printing, the balance shall be paid out of the fee fund.

With the view of following out this section of the act, the relative A. S. 24 Dec. 1838, (*Enrolment of new Causes*), § 14, enjoins that the keeper of the minute book of the Court of Session shall be supplied by the respective keepers, with printed copies of the minute book of the teind court, the weekly calling list of causes, and the weekly printed roll of outer-house and teind causes, for the purpose of sale, at a price or rate conformable to the enactments in the said clause of the statute; and the said keeper shall annually exhibit an account of said sales, as also of the sales of the minute book of the Court of Session, to the auditor of court; and the keeper of the record of edictal citations shall also sell, and in like manner annually exhibit a similar account of the sales of the record kept by him, as directed by said act. Farther regulations regarding the printing, sale, and distribution of the minute book, rolls, calling lists, &c., are prescribed by A. S. 4 June 1841.

On a suggestion from the Head of the court in spring 1847, following on a representation from the deputy-keeper of the signet, the minute book is now published at each box-day during the two vacations; no formal A. S. has been passed on the subject. (See the form of the minute book, &c. Apx. No. 1).

By § 7 of the A.S. 24 Dec. 1838, (*Forms of Extracts, &c.*), it is declared that the offices of keeper of the records of the Court of Session, (*supra* p. 114), and of keeper of edictal citations, having been disjoined by the said statute 1 and 2 Vict. c. 118, all citations against persons furth of Scotland shall be made at the office of the keeper of edictal citations, notwithstanding that the record office of the Court of Session is mentioned in Schedule No. 1 of the act 1 and 2 Vict. c. 114, (16 Aug.

1838), and in the act 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825).

#### SECT. X.—AUDITOR.

The auditor was appointed at first by the court, A. S. 6 Feb. 1806, and his fees were regulated by 50 Geo. III. c. 112, (20 June 1810), § 48. The office was made permanent by 1 and 2 Geo. IV. c. 38, (28 May 1821), § 32, and is held *ad vitam aut culpam*. The appointment is in the crown. Two auditors may be appointed, if necessary, one for each division. No one can be named auditor unless he be a writer to the signet, or a member of the incorporation of solicitors before the supreme courts, who has practised for three years. He must not practise, either directly or indirectly, before the Court of Session, under pain of deprivation of office. In case of the auditor being unable to discharge his duties, by temporary indisposition or absence, the court may appoint a fit person, though continuing to practise as an agent before the court, *ibid.* His duty is to tax all accounts of expenses decerned for by the court, or remitted to him. His salary is fixed at £700 per annum, with the accommodation of office room, or an allowance for the same, 1 and 2 Vict. c. 118, (16 Aug. 1838), § 24; *H. M. Advocate, Petr.*, 20 Dec. 1838, i. D. 283.

#### SECT. XI.—COLLECTOR AND ACCOUNTANT OF THE FEE FUND.

The clerks and other officers of the court were paid originally by fees, some of which were collected by the officer himself to whom the fees belonged, and others by a collector of the clerks' dues.

Salaries, as already mentioned, were given to the principal and depute clerks, by 50 Geo. III. c. 112, (20 June 1810); and § 18 of that act authorized certain fees to be collected, as

specified in a schedule annexed. The dues of court then payable to the clerks of session, and the office of collector of clerks' dues, were abolished, and the Lord President was authorized to appoint a collector of the new fees, holding his office *ad vitam aut culpam*. He has now a fixed salary of £400 per annum, and is nominated by the crown, 1 and 2 Vict. c. 118, ( 16 Aug. 1838), § 23. He must discharge his duty in person, by attending in the collector's office during office hours, and marking on each paper that the proper fees have been paid, of the date marked ; and he is farther to demand and receive, once a-month, the fees which the principal clerks were in use to receive upon extracts and instruments recorded in the books of session, 50 Geo. III. *supra*. Regulations are also made as to his finding security, keeping proper books, &c. By § 24 of the above statute, 50 Geo. III. the collector is ordered to render his account twice in every year to any accountant to be named by the President of the College of Justice. By § 23 of the statute, 1 and 2 Vict. *supra*, the accountant to the fee fund is allowed a salary of £100 per annum, while he shall hold the office.

#### SECT. XII.—MACERS.

The macers are the servants of the court. Their duty is to carry the mace before the judges when they come into or go out of the court, and in processions ; to keep order in the court ; to call the rolls ; and to execute such warrants for the apprehension of delinquents, &c. as are addressed to them, and in general to receive and execute the orders of the judges. When processes, after being borrowed, are not returned in proper time, they execute the captions issued against the borrowers to force them back,

There are at present seven macers, six of whom hold their commission from the crown, and one from the proprietor of Myres ; A. S. 17 June 1760 ; A.S. 11 Mar. 1791 ; *Gardner*



v. *Grant*, 11 Mar. 1835, xiii. S. 664. They hold their offices *ad vitam aut culpam*. They are all equally bound to perform their duty of macers in the Court of Session, Court of Teinds, or elsewhere. Their salary is £100 per annum; 1 and 2 Vict. c. 118, (16 Aug. 1838), § 25. The macers had formerly an anomalous jurisdiction in services, but it was abolished by 1 and 2 Geo. IV. c. 38, (28 May 1821), § 11. The principal clerks and macers are the only officers of the court who wear gowns.

#### SECT. XIII.—INFERIOR OFFICERS.

Besides, there are a number of inferior officers, as two keepers of the Parliament House, appointed by the court and the magistrates of Edinburgh alternately, in terms of a contract between them, 23 June 1694, A. S. 207, see also 509; a Superintendent of public buildings, named by the trustees for the erection of courts of justice, &c.; a Crier, whose appointment is in the Dean of Faculty; and bar keepers and gown keepers, nominated by the Faculty of Advocates and Writers to the signet. *Faculty of Advocates v. Macers*, 21 June 1694, M. 355.

#### SECT. XIV.—OFFICES ARE NOT SALEABLE.

It was formerly not unusual for those having the appointment to some of the preceding offices, to dispose of them for money, or other valuable consideration, to themselves, or friends. The sum to be paid for the offices of principal and depute clerk of session was even fixed by the Regulations 1695, § 10, Folio, A. S. 209; Alex. Abridgt. of A. S. Apx. 131. The Act of Sederunt, 10 Mar. 1798, *in fin.*, however, enacts, that no person shall be admitted an assistant clerk of session unless he appear before the Lord Ordinary in the outer-house, and make oath *de fide*, " and also that he has

neither paid nor promised to pay, nor come under any understanding by himself, or by any other person or persons, to pay, nor, in fact, will pay any sum of money, or make good any valuable consideration whatever, for obtaining, or continuing to enjoy, said office." And if it is afterwards established that the oath is inconsistent with truth, or has not been duly observed, the offender is incapable of holding the office of assistant. The act 50 Geo. III. c. 112, (20 June 1810), § 44, in conferring the appointments of the depute clerks of the bills on the principal clerks of the bills, declares they shall be made "without any price, gratuity, or valuable consideration of any kind;" see also § 26, regarding the nomination of the depute clerks of session, then in the hands of the principal clerks; and the same words are used relative to the nomination of the extractors by the principal clerks of session, 1 and 2 Geo. IV. c. 38, (28 May 1821), § 19. And all such traffic is prohibited, *per aversionem*, by 5 and 6 Edw. VI. c. 16, (1552), extended to Scotland by 49 Geo. III. c. 126, (20 June 1809), §§ 1, 13. The parties contravening these acts forfeit, the one the right of appointment, and the other the office to which he has been named, and the right vests in his Majesty. The contraveners are farther liable to be punished by fine and imprisonment. The court set aside an arrangement between two candidates for the office of keeper of the Parliament House as null at common law; *Thomson v. Dove*, 16 Feb. 1811, F. C.; but, in the case of *Haldane v. De Maria*, who were both Extractors in the Register House, the principle of this case was not held to apply to an arrangement, whereby Haldane having fallen into bad health, De Maria undertook to perform the duties of both offices, and to allow Haldane, and in the event of his death, his family, a share of the profits, during the endurance of the contract, 6 Mar. 1812, F. C. The *ratio decidendi* here given was this, that the

stipulation in favour of Haldane and his family had no influence in procuring De Maria's appointment, as the arrangement between the candidates had in the former case. An agreement to pay an annual sum for procuring the office of a macership in the Court of Session, in the gift of a private party, held not actionable; *Gardner v. Grant*, 11 Mar. 1835, xiii. S. 664; *Bruce v. Grant*, 27 Feb. 1839, i. D. 583. An arrangement between a depute and assistant clerk of session, whereby the latter was, for a certain consideration, to perform the whole duties of the office to which they were both attached, was held *pactum illicitum*, *Mason v. Wilson*, 28 Nov. 1844, vii. D. 160. On 20th May 1840, the party appointed collector of the Fee Fund (*supra*, Sect. xi.) was burdened with the payment of £200 per annum to the party retiring, on account of his advanced age and incapacity to perform his duties. Unprinted A. S. 20th May 1840. See various illustrative cases in *M. and in S. Dig. voce Pactum Illicitum*.

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## CHAPTER V.

### OF THE TIME OF SITTING OF THE COURT, BOX-DAYS, &c.

The time of the sitting of the court has varied at different periods. It formerly sat from the 1 of November to the 1 of March, and the statute for correcting the calendar, 24 Geo. II. c. 23, (1751), § 4, declared the sittings should not be altered. As the effect of this correction was to make the month commence eleven days sooner than before, the court subsequently sat from the 12 Nov. to 11 March, both inclusive, with an adjournment of twenty days in December and January, called the Christmas Recess; see A. S. 21 Dec. 1661,

2 Geo. III. c. 27, (1761). This adjournment always takes place from the Tuesday immediately before Christmas day till the third Saturday following.<sup>1</sup> The Summer Session was formerly from 12 May to 11 July; 30 Geo. III. c. 17, (1790); A. S. 12 May 1790. By 11 Geo. IV. and 1 Gul. IV. c. 69, (23 July 1830), § 10, his Majesty was empowered to extend the sittings, either of the whole court, or of the permanent Ordinaries exclusively, for one calendar month in the course of the year; and certain returns are required to be made annually by the Lord President to Parliament, to shew the state of the business before the court.

The existing regulations as to the sittings of the court, are those contained in 2 and 3 Vict. c. 36, (29 July 1830), § 9, &c. The sittings of the whole court, both inner and outer houses, for the Summer Session, "shall commence on the first lawful day (Monday excepted) which shall happen next after the 19th day of May yearly, and shall terminate on the 20th day of July yearly, or on the Saturday immediately preceding the said 20th day of July, when the same shall happen to fall on Sunday or Monday; the sittings of the two divisions of the inner-house for the Winter Session, shall commence and terminate as at present; and the sittings of the Lords Ordinary in the outer-house for the Winter Session shall commence on the first lawful day (Monday

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<sup>1</sup> "The Christmas vacation is only an adjournment of court, and is, notwithstanding, part of the winter session. Days of compearance are often made to fall within it. (This refers to a regulation not now in force). The duration of it, or even the existence of it, is left to the pleasure of the Lords; for there is no obligation, but only power given them to adjourn. In an adjudication, *Peadie v. Hamilton*, in order to bring an adjudication within three years of the predecessor's death, a remit was craved to the Ordinary on the Bills during the Christmas vacation, to decern in the adjudication, but this was refused, 14 Dec. 1776."—Tait's MS. "*Preliminarys of Proces.*"

excepted) which shall happen next after the 31st day of October yearly, and shall terminate on the 20th day of March yearly, or on the Saturday immediately preceding the said 20th day of March, when the same shall happen to fall upon a Sunday or Monday."

The court is empowered, "if there shall be arrears of business in the said court, or as the state of business otherwise may require, from time to time to direct, by act or acts of sederunt, that the Winter and Summer Sessions of the Court of Session, or either of them, shall be extended, and to specify the time or times of such extension, and the precise duration thereof, and to direct that such extension shall apply either to the whole Court of Session, or to either of the divisions thereof, or to all or any of the Lords Ordinary, and to make all regulations which may be required in consequence of any such extension, or connected therewith: Provided always, that such extension shall not on the whole exceed the usual period of the sittings of the said court previous to the passing of this act, by more than the space of two calendar months in the course of the year; and that it shall thereafter in like manner be lawful for the said court to alter and limit the said period of extension from time to time, as occasion may require; and provided also, that sederunt days shall be reckoned from and regulated by the meeting of the inner-houses of the court, and not by the sittings of the Lords Ordinary," § 10.

Her Majesty may, with the consent of her Privy Council, from time to time "order and direct the extension of the duration of the sittings of the said court, or either of the divisions thereof, or of all or any of the Lords Ordinary, and alter or limit such extension to such and the like duration, and in such and the like manner as the judges of the said court are herein before authorized to alter the sittings thereof," § 11.

By the relative A. S. 8 Aug. 1839, § 4, it is declared, that "the sittings of the Lords Ordinary appointed" "to take place from and after the 31st Oct. to the 12th Nov., and from and after the 11th to the 20th of March, shall be held on the same days and in the same manner as the other sittings of the said Lords Ordinary in the course of the session."

The court originally sat every day in the week, except Sunday. For a great length of time, however, it has not sat on Monday. This day is reserved for the sittings of the Court of Justiciary, and that counsel and agents may have one day in the week, free from interruption, to attend to business at their own chambers.

The hour of meeting of the court was originally eight<sup>1</sup> in the morning, 1537, c. 49, (*i. e.* A. S. 27 May 1532), § 7.<sup>2</sup> But now the hours of sitting are nine o'clock in the outer-house, and eleven in the inner; A. S. 11 July 1828, § 71. There are, in general, some of the judges sitting as late as half-past two or three o'clock; but the length of sitting depends greatly on the amount of business.

Two box-days<sup>3</sup> are appointed in each vacation, and one in the Christmas recess. These are the days on which papers are appointed to be lodged with the clerks of court, to expedite the proceedings in the causes depending before the court. Summonses may now be called (*infra* P. ii. 4. A.) at either of the box-days in the autumn vacation, and defences may be returned at the second box-day, or on the meeting of the court in November.—*Infra* P. ii. 4. A. 4.

The court has a seal, which is used when commissions

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<sup>1</sup> Some of the judges in older times also sat in the outer-house at eight o'clock in the morning, A. S. 11 July 1673.

<sup>2</sup> See *supra* p. 2, Note 1.

<sup>3</sup> So named from the boxes ordered by the A. S. 29 Nov. 1690, to be placed for the reception of papers given in to the judges.

are sent to foreign countries, when decrees are to be used abroad, and also when reports are made to the King or to Parliament. Access may be had to it by applying to the Lord President's clerk; see A. S. 1 July 1777, &c.; A. S. 10 Mar. 1798.

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## CHAPTER VI.

### OF THE PRIVILEGES OF THE MEMBERS OF THE COLLEGE OF JUSTICE.

#### SECT. I.—ORIGIN OF PRIVILEGES.

By the civil law, as well as by the practice of many nations, in modern times, which adopted that law, the members of courts of justice were entitled to many privileges and exemptions. Probably, in consideration and imitation of this practice, it was thought proper to confer various privileges and immunities on the members of the College of Justice.

These privileges are coeval with the institution of the court. By a confirmation and ratification of King James the Fifth of the statutes and regulations for the conducting of business in the court, there is the following clause:—"Attour, because the saidis personis" (the Lords of Session) "mone awate daylie upoun our said Sessioun, except at feriat tymes, and suld be, therefor, priviledged abone uthers,—heirfor we have exeemit, and, be the tenor heiroyf, exemis them, and every ane of them, baith spiritual and temporale, fra all paying of tax, contributioun, and uthir extraordinarey chargis, to be upliftit in ony tymes cuming; and fra the bering of ony officis and chargis wythin burgh, or utouth, bot giff it be wyth thar awin fre will and consent." 1537, c. 68, (A. S. 1532—1553, &c. p. 6).<sup>1</sup>

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<sup>1</sup> See *supra* p. 2, Note 1.

Little reliance could, however, be placed on this exemption, as the king was then a minor. By the bulls of the Popes above referred to (*supra* p. 2), the judges, advocates, writers, clerks, and other members of the new court, had certain privileges and immunities conferred upon them; and a statute was passed after the king had arrived at his "perfitte aige of xxv. yeris," 1540, c. 93, (c. 10. Th. Ed. ii. 371), by which the whole privileges granted by the King and the Popewere ratified and confirmed. On Queen Mary's accession to the throne, another statute was passed, ratifying the institution of the College of Justice, "with all privileige, fredomes, and liberteis gevin and grantit to the samyn;" 1543, c. 1, (c. 7, Th. Ed. ii. 443). By act of sederunt, 11 May 1555, the court, with the view to the greater dispatch of the judicial business of the members of the College of Justice, ordained, that "there be ane table maid separatlie be itself for all the Lords of Sessioun, thair scribis, advocatis, and members of court." The act 1555, c. 39, (c. 12. *in fin.* Th. Ed. ii. 494), passed shortly afterwards, enacted, "that na advocatioun of causis be takin be the Lordis fra the Juge Ordinar, except it be for deidlie feid," &c. "or the causis of the Lordis of Counsall. and their advocatis, scribis, and members." It was accordingly decided, 10 Dec. 1561, that no Lord of Session, advocate, scribe, writer to the signet, nor other member of the court, may be called in any action before an inferior judge, but before the Court of Session only, Balf. 270; and a few years afterwards, it was farther found that they were free from all taxations, stents, and impositions raised for government or otherwise, 15 Dec. 1565; *Advocates contra Edinburgh*, Balf. 270. The judges anciently insisted on having their own cases called in the inner-house. and not being bound to answer in the outer, *Melville v. Livingstone*, 9 Mar. 1610, M. 2400; *Hamilton v. Tenants of Bowschieldhill*, 27 June 1611, *ibid.* Shortly after the accession of James VI.



to the throne, an act was passed for the express purpose of making all persons contribute to the taxes imposed on burghs, notwithstanding any privilege or exemption, but under the provision "that this act be not prejudicial to the members of the Colledge of Justice, and to thair privilegis, and immunities grantit unto thame," 1592, c. 155, (c. 75, Th. Ed. iii. 579). But matters were not allowed to rest there, for a statute was again passed, ratifying and approving all acts, constitutions, and ordinances made in favour of the Senators of the College of Justice and members thereof, 1593, c. 174, (c. 24, Th. Ed. iv. 22); and another act, in still more ample terms, will be found in the ensuing year, 1594, c. 215, (c. 21, Th. Ed. *ibid.* 67). In the year 1597, a taxation was granted to the king, see c. 281, and all privileges and immunities enjoyed by every person were annulled, "exceptand allanerly the privileges of the Lords and members of the Colledge of Justice, whereunto his Hieness and Estaites will nawayes derogate in ony thing." The succeeding monarchs, Charles I. and Charles II. also confirmed these privileges, 1633, c. 23, (Th. Ed. v. 41), and 1661, c. 23, (c. 260, Th. Ed. vii. 240). This last act, after ratifying the privileges and immunities from taxation, conferred by his royal predecessors "in favour of the College of Justice, and of the senators, advocats, clerks, writters to the signet, and remanent members of the same, or whairof they had been in use and possession in any tyme bygone," declares and ordains, "that the whole privileges, liberties, and immunities forsaid, granted and belonging to the ordinary lords and senators of the Colledge of Justice, shall be extended, belong and appertaine to, and enjoyed be the advocats, clerks, and remanent members of the said Colledge of Justice, in all time comeing, notwithstanding of whatsoever act, custome, or practise to the contrare." This statute has been represented as extending for the first time the privileges beyond the judges or

senators; but this is evidently a mistake, as appears from the act of James VI. and from the other statutes and authorities above quoted. Another act was passed in the reign of Charles II. confirming the privileges of the judges, 1670, c. 8, (c. 12, Th. Ed. viii. 18). The nineteenth article of the treaty of Union ratifies and secures all the privileges of the members of the College of Justice, (Th. Ed. xi. 451).

SECT. II.—TAXES FROM WHICH MEMBERS ARE EXEMPT.

Notwithstanding the previous statutes and confirmations, there was still some doubt, both as to the taxes from which the members were exempted, and also to the persons who were entitled to the privileges. In consequence of these doubts, the question was brought to a solemn trial in February 1687, *College of Justice v. Town of Edinburgh*, M. 2402, and it was finally settled by that decision that the members are exempt from payment,—

1. Of the annuity levied for payment of the ministers' stipend,—

2. Of watching and warding, and any impositions for the same,—

3. Of customs, causey mails, shore dues, and other impositions laid on their provisions of meat and drink, and their other goods, carried to or from the town, and collected at the ports or other places within the liberties of the town: And it was declared, that the production of a certificate, subscribed by a member of the College of Justice, bearing that the provisions or goods do properly belong to him, shall be sufficient for freeing them from paying the said customs and impositions,—the certificate being renewed once in the half year, at least. By the 25 Geo. III. c. 28, §§ 59 *et seq.*, the impost or tax levied upon the inhabitants of Edinburgh, Leith, the Canongate, and Portsburgh, on the importation of wines, spirits, ale, beer, &c. was taken off private families;

and a tax of one per cent. on house rents imposed on occupiers, in its place ; but it was continued in force, as far as related to vintners, shopkeepers, innkeepers, and others who imported liquors for sale. The members were farther declared exempt from the civil jurisdiction of the magistrates of Edinburgh ; and that, upon their proponing declinator thereof, the magistrates ought to desist from any procedure against them, without necessity of advocacy. The right of employing unfreemen to work for them, (now of no importance), and exemption from the criminal jurisdiction of the magistrates, were also claimed for the College of Justice ; but no decision was given by the court on these points.

Another tax, from which the members were exempted, was the poor rates, payable to the town of Edinburgh. Poor rates were first imposed by the act 1579, c. 74, (c. 12, Th. Ed. iii. 139). In the year 1597, another act, c. 279, (c. 46, i bid. iv. 141), was passed, relative to the collection of poor rates in royal burghs, from the operation of which statute the members of the College of Justice are expressly exempted. A statute passed in 1686, c. 12, (c. 22, Th. Ed. viii. 595), authorizing the Lords of Session, with consent of the magistrates, to impose a tax on the inhabitants of Edinburgh and suburbs, to cleanse the streets, and rid the town of beggars ; and the court, by an Act of Sederunt, (29 Jan. 1687), subjected themselves voluntarily to a temporary assessment ; and additional assessments were also raised voluntarily, from the members of the court, in the year 1692, &c., and from 1731 to 1734 ; see A. S. Index, *voce* Poor. In consequence, probably, of these voluntary assessments, the magistrates of Edinburgh endeavoured to compel the members of the college to pay poor rates. This attempt occasioned the matter to be deliberately tried, and the result was—that it was unanimously decided, that the members of the College of Justice were not liable for poor rates to the Magistrates of

Edinburgh, 29 Jan. 1788, M. 2418; and this decision was affirmed, on appeal, 25 Mar. 1790.

By § 50 of the late poor law act, 8 and 9 Vict. c. 83, (4 Aug. 1845), it is declared that "the privileges of exemption from payment of assessments in the city of Edinburgh, possessed and enjoyed by members of the College of Justice, and officers of the queen's household, shall not be applicable to assessments imposed and levied for the relief of the poor, under the authority of this act." Previously the whole exemptions were estimated to amount to about  $7\frac{1}{2}$  per cent. on the real rental.

It has sometimes been maintained, that the members of the College of Justice were exempted from payment of cess; but such an opinion is without foundation. It no doubt, appears, that for a century and a half after the institution of the court, the members were free from all taxations of every kind; and in the acts of convention, 4 Aug. 1665, (Th. Ed. vii. 531), and 23 Jan. 1667, (ibid. p. 539), imposing a land tax or cess, there is an express exemption of the members of the College of Justice. But, in the act of convention, 10 July 1678, (ibid. viii. 221), no such exception is to be found, nor does it appear in any of the subsequent acts relating to the cess. On the contrary, several of them, and particularly the act 1706, c. 2, (Th. Ed. xi. 317), imposing an eight months' cess out of the land rent, expressly declares that "no persons shall be exempted from payment of their proportion thereof, for their lands, upon any pretence whatever, except mortified lands, and the lands of New Mills, notwithstanding of any former law or privilege to the contrary." This act is dated 9 Nov. 1706, and the act ratifying the treaty of Union with England, 16 Jan. 1707, (ibid. 406). Now, by the ninth article of the treaty, it is declared, that when £1,997,763. 8s. 4½d. is raised on land in England, £48,000, free of all charges, shall be raised on land in Scot-

land; and so in proportion, for any greater or lesser sum; and such tax in Scotland shall "be raised and collected in the same manner as the cess now is in Scotland." So that there cannot be any doubt that the members of the College of Justice are liable for cess. Indeed, in the action raised against the magistrates of Edinburgh, in 1687 *supra*, to ascertain the extent of the privileges, it was not even pretended that the College of Justice was free from cess, but only that it was not fairly imposed. Accordingly, Mr. Erskine, i. 3. 17, says, the members of the College of Justice have not claimed an exemption from the land tax since the Revolution, and, it is believed, not even since the Restoration.

#### SECT. III.—IN WHAT CASES NO EXEMPTION.

Some farther limitations of the right of exemption have been introduced by immemorial practice. The original reason for the exemption was, "because the saidis personis mone awaite daylie upoun our said Sessioun except at feriat tymes," 1537, c. 68, (*supra* Sect. i.); and the same reason is repeated in subsequent statutes, 1661, c. 23, (Th. Ed. vii. 240). It is therefore only the local taxes of the place where the court is sitting from which the members are exempted. Thus, as the court sits constantly in Edinburgh, a member of the College of Justice who resides beyond the limits of the city of Edinburgh has no exemption whatever, even though he may be so near the city as in reality to practise in the court. This was settled long ago, *Christian v. J. Syme*, 16 June 1779, M. 2416, with regard to the annuity payable to the burgh of Canongate for the maintenance of a Minister there. But if a tax is levied for behoof of the city of Edinburgh, the exemption applies, though the place where the member of court resides is not properly part of the city, but only a suburb, subject to be taxed for behoof of the magistrates

of Edinburgh. Thus, though annuity for the minister of the Canongate must be paid by one who resides there, the impost exigible on wines and liquors is not leviable, for it is accounted for to the magistrates of Edinburgh; see last case.

In the same way, if a person lived beyond the bounds of the city, in the West Church parish, he was always liable in payment of the poor rates of that parish.

#### SECT. IV.—LIST OF MEMBERS OF COURT.

The decision in 1687, (*supra* Sect. ii.) ascertained who were the members of the College of Justice at that time, and they were declared to be,—the Lords of Session; advocates; clerks of session; clerks of the bills; the writers to the signet; the depute clerks of session; three substitutes for registrations, one in each clerk's office; three depute clerks of the bills; the clerks of exchequer; the directors of the chancery, their depute and two clerks thereof; the writer to the privy seal and his depute; the clerks of the general register of sasines and hornings; the macers of the session; the keeper of the minute book; the keeper of the rolls of the inner and outer houses; one actual servant of each Lord of Session; one servant of each advocate; four extractors in each of the clerk's offices of the session; two servants employed by the clerk of register in keeping the public records; the keeper of the session-house; and the keeper of the advocates' library. But if "any of these servants, and others, keep merchant's shops, taverns, or ale-houses, or exercise any other trade within the burgh, they shall not enjoy any of the privileges above mentioned."

The privileges have also been considerably extended by statute, as to the Barons and other members of the Court of Exchequer, 6 Anne, c. 26, (1707), § 10; to the Lords' Commissioners and Officers of the late Jury Court, 59 Geo. III. c. 35, (19 May 1819), § 36; to the collector of the

fee fund, the auditor of court, the keeper of the judicial records in the Court of Session, (see *supra* p. 114), and the assistants of the principal clerks of session, 1 and 2 Geo. IV. c. 38, (28 May 1821), §§ 29, 32, and 22.

It was once attempted to deny a member of the College of Justice his privileges, on the ground that he had retired to the abbey to avoid the diligence of his creditors,—but without success; see *Anstruther v. Gordon*, 11 Jan. 1710, M. 2414.

In two very old cases, it was found, that the widow of a Lord of Session was entitled to the privileges of her deceased husband, during her widowhood; *Lord Traquair v. Lady Newbattle*, 7 June 1593, M. 2399; and *Sands v. Lothian*, Feb. 1610, M. 2400.

#### SECT. V.—MEMBERS NOT BOUND TO ANSWER IN AN INFERIOR COURT.

As already mentioned, (*supra* p. 11), the members of the College of Justice have the privilege of not being amenable to the jurisdiction of any inferior court for any civil claim of debt, with the few exceptions there noticed. In criminal cases, they seem to have no privilege, for the Court of Session is not a criminal court. As the Exchequer also is the King's revenue court, they do not appear to be entitled to claim any exemption from the jurisdiction of that court in revenue questions. But though a member reside in the abbey, to avoid the diligence of his creditors, he is still entitled to decline the jurisdiction of the bailie; *Anstruther v. Gordon*, 11 Jan. 1710, M. 2414.

Like all other privileges, that of not being bound to answer before an inferior court will not be noticed by the inferior judge, unless it is pleaded. A decree in absence, therefore, against a member before an inferior court, is perfectly good, *Laidlaw v. Wyld*, 9 June 1801, M. Arrest. Apx.

No. 4;<sup>1</sup> when the privilege is pleaded, the sheriff sists process for a certain period, to allow the party to advocate. If no advocacy is presented within the time, the sheriff proceeds with the cause. In terms of the judgment, in 1687, (*supra* p. 130), the magistrates of Edinburgh should sustain the privilege, without putting the party to the necessity of advocating. "No other inferior judge is bound to sustain such declinator, (without advocacy), and so it was this day found in a suit before the sheriff of Linlithgow, against one of the principal clerks of the bills, 20 July 1769. Yet see Fount. p. 197, i." (*Dick v. Deans*, 29 Nov. 1682, iii. Sup. 440); Tait's MS. "Advocation;" see farther on this privilege, *supra* P. i. 2. 2.

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<sup>1</sup> The decree was in absence, though the report does not state this. See Session Papers.





**PART II.**

**OF THE PROCEEDINGS UNTIL THE CASE  
IS ENROLLED.**



## PART II.

### OF THE PROCEEDINGS UNTIL THE CASE IS ENROLLED.

#### CHAPTER I.

##### OF THE TITLE TO SUE AND DEFEND.

###### SECT. I.—PARTY MUST HAVE A PROPER INTEREST.

It is evident, that, to entitle a party to institute an action in a court of law, he must have a proper interest, such as a court can recognize. However clear, therefore, one's title to pursue an action may be, if he can derive no benefit from it, he will not be allowed to insist in a court of law, *Macdonell v. Macdonald*, 20 Jan. 1826, iv. S. 371, (N. E. 374). Farther, even if a party would probably succeed in the action, he cannot be permitted to pursue, if it appear that the consequences of his success would be to render him liable in claims of a greater or equal value to that which he demands; for the maxim of the law is, *frusta petis quod mox es restitutus*, *Carmichael v. Sir J. G. Carmichael*, 15 Nov. 1810, F. C., Aff. 15 May 1816; 19, F. C., 767; *Steele v. Young*, 23 Jan. 1823, ii. S. 146, (N. E. 134); *Smith v. Paton or Shields*, 18 Feb. 1830, viii. S. 553; or if he can otherwise receive no benefit by it, *Robertson, &c. v. Megget, &c.* 28 Feb. 1822, i. S. 364, (N. E. 342). Questions of such a nature are not of frequent occurrence, as few are inclined

to institute suits from which they can derive no benefit. The common case is where one has an interest, but not a sufficient title to pursue. The interest of the defender to see that the pursuer has a proper title is obvious; for, otherwise, the discharge granted on payment of the claim may be insufficient, and a decree of absolvitor will not afford a plea of *res judicata*; see *infra*, P. ii. 2. 7, *ad fin.*

The remarks now to be offered relate, in general, to the title to pursue ordinary petitory actions, leaving the title to insist in other actions, as adjudications, rankings and sale, reductions, &c. to be afterwards considered.

The first matter to be discussed is the personal status of the party. Now, in general, if he be major, and resident in Scotland, he may sue and defend in his own name alone.

#### SECT. II.—PUPIL.

But if he be in pupillarity, the action is raised in the name of his father as his administrator-in-law, and in the name of his tutors, if his father be dead, Ersk. i. 6. 54. and i. 7. 14; for the grandfather is not administrator-in-law, Ersk. i. 6. 55, *Laird of Lamington v. Jolly*, Feb. 1685, M. 16,306; neither is a father administrator to his bastard child, Ersk. *ut sup.* An action of damages for personal injury to a pupil, at his own instance *nominatim*, with concurrence of his father as his administrator-in-law, and also at the instance of the father *nominatim*, as administrator, concluding for payment to the pupil *nominatim*, was sustained, *Keiths v. Archer*, 24 Nov. 1836, xv. S. 116. Where the father is dead, and no tutor has been named, or where the action is against the father or tutor, or where he is incapable of concurring, or has an adverse interest, the summons will be raised in name of the pupil alone; and when the action comes into court, a curator *ad litem* will

be appointed; *Macneil v. Macneils*, 22 Feb. 1798, M.16,384; *Rankine and Trustee, Petrs.*, 11 July 1821, i. S. 119, (N. E. 117); *Bogie v. Bogie*, 18 Dec. 1840, iii. D. 309. The court will, however, not appoint a curator *ad litem* to concur in raising the summons, as such a curator is only appointed *ad litem pendentem*, *Youngs, Petrs.*, 20 Dec. 1828, vii. S. 220; *Wallace*, (party fatuous), 20 Nov. 1830, ix. S. 40; and diligence by inhibition or arrestment may be used on such a summons as in ordinary cases; *Johnston v. Johnston*, 16 Jan. 1740, M. 16,346. The court never, in the case of parties under age, authorize tutors or curators *ad lites* to carry on actions in general, but only *ad hanc litem*, to the particular action; *Baird, &c., Petr.*, 13 Jan. 1741, M. 16,346. Where there were several tutors, it was held in an old case that action might be raised with concurrence of one of them only; *Stark v. Stark*, 3 Dec. 1746, M. 6291. Where the case is in dependence in the House of Lords, it is of course incompetent (without a remit) to name a curator *ad litem* in the Court of Session; *M'Kenzies, Petrs.*, 9 Mar. 1822, i. S. (N. E. 372).

Tutors *ad litem* are not liable in expenses of process; *Fraser, &c. v. Pattie and Tutor, &c.*, 9 Mar. 1847, ix. D. 903.

#### SECT. III.—MINOR.

In the case of a Minor, he is in all cases the proper pursuer, but his father as administrator, or his curator, if his father be dead, must concur with him, and if he have neither, or the action be against them, &c., the summons will be raised in his own name, and a curator *ad litem* will be appointed when the action comes into court, *M'Conochie v. Binnie*, 2 Mar. 1847, ix. D. 791; in *M'Kirdy* or *M'Lachlan, &c. v. M'Lachlan, &c.*, 26 May 1840, ii. D. 949, a summary application to a sheriff in name of a father as guardian to a minor son for delivery of title deeds, was, in special circumstances,

sustained as competent without the son being made a party. Where children had an adverse interest to their father in a sequestration, it was held unnecessary to have a factor *loco tutoris* appointed, and the court named a curator *ad litem* in the process of sequestration; *Saunders, Petr.*, 10 July 1821, i. S. 115, (N. E. 113). As to the necessity of libelling in an action of multiplepoiniding raised in name of a minor, that it is insisted in with consent of curators, see *infra* P. iv. 6. 3.

It is the interest of the defender, where the pursuer is a pupil or minor, to see that a curator *ad litem* is appointed, for if he obtain decree of absolvitor, the minor may more easily set aside the proceedings, on proof of lesion, and proceedings at the instance of a pupil without a curator *ad litem* are null. If, on the other hand, the defender go on without a curator, and the minor or pupil obtain decree against him, the defender will be barred, *personali exceptione*, from objecting to the decree. Though neither party apply for a curator, it is the duty of the judge to appoint one, *Ersk. i. 7. 13; Rankine and Trustee, Petrs.*, 11 July 1821, i. S. 118, (N. E. 117). The court, however, will not appoint a curator to concur with a minor in special pieces of business, as granting a disposition he has been decerned to execute, *Graham, Petr.*, 17 June 1696, M. 16,316; but they will name a curator *ad litem* to give in a renunciation for a pupil to be heir to his father; *Pyper, Petr.*, 5 Jan. 1711, M. 16,330.

In all actions against pupils or minors, not only the pupil or minor must be cited, but his tutors or curators. These last are cited at the market cross of the county town of the minor's residence; *Ersk. iv. 1. 8*. Where the minor is forth of the kingdom, the tutors and curators were ordered to be cited at the record office of the keeper of the records in the same way as the minor; A. S. 11 July 1828, § 22, now at the office of the keeper of edictal citations, A. S. 24 Dec. 1838,

(*Extracts, &c.*), § 7, *supra* p. 117. Where the minor is in the kingdom, it is not of course necessary to cite the tutors and curators, though out of it, at the office of edictal citations, but only edictally at the market cross of the county town of the minor's residence, in common form; *Fairholm v. M'Kenzie*, 29 July 1710, M. 3709. This is the proper place for citation, even when the action is real, and not the head burgh of the county where the lands lie; *ibid.* and *L. Rankilor v. L. Aiton*, 26 July 1625, M. 3707. They can only be cited on a summons, and it is incompetent to cite them on a diligence; *Dalglish v. Hamilton*, 18 Feb. and 26 June 1752, M. 2184.

If they are not cited, any decree in absence obtained will be void and null, *ibid.* *Brackenridge*, i. Bell, Com. 705, Note 3; *Macturk v. Marshall, &c.* 7 Feb. 1815, F. C. If the minor states the objection, the process will be dismissed. Where the father is alive, he need not be specially cited as administrator, as it is enough if tutors and curators are cited generally; *E. Kinghorn v. Collace*, 8 Mar. 1626, M. 2180. In another case, *Buchanan v. Gray*, 20 Jan. 1801, M. App. Adjud. No. 12, though the edictal citation was sustained, the court thought it better had the father been specially cited. On the other hand, if the father be cited specially, it is unnecessary to cite tutors and curators edictally; *L. Lie v. Porteous*, 17 July 1630, M. 2182. Where a female minor is married, it is sufficient to cite her husband and herself, as the husband excludes all other curators, *Ersk.* i. 6. 20; *French v. Frenches and Cranston*, 2 July 1622, M. 2179. It seems no sufficient answer to the objection that tutors and curators have not been cited, that there are none; *Crichton v. Lord Rossie*, 6 Mar. 1573, M. 2178; though *Ersk.* iv. 1. 8, seems to think a citation in this case unnecessary. It is, however, the practice to cite edictally though there be none. In the case of *Agnew v. E. of Stair, &c.* 31 July 1822, i. S. App.



333, the objections that the tutors and curators of the pursuer's own children were cited edictally at Edinburgh instead of Wigton, and that no tutor *ad litem* had been named to them, were held fatal, though an edictal citation would appear unnecessary where there cannot be any tutors or curators the father being alive ; and it is now settled (*infra*), that it is incompetent to appoint a curator *ad litem* in absence of the defenders.

It was for many years the practice, where no appearance was made for the pupil or minor, when the cause came into court, for the judge, on the motion of the pursuer, to appoint a tutor *ad litem*, who was allowed to see the process, and given in defences, if he thought proper ; and where decree had been taken in absence, without such appointment, the court held it null ; *Bannatyne v. Jack*, 14 Dec. 1814, F. C. The question came, however, to be more fully considered in *Sinclair, &c. v. Stark*, 15 Jan. 1828, vi. S. 336 ; and on a consultation of the whole judges, they, by a great majority, held that such a decree was not null, but merely liable to be opened up as in absence. This decision was afterwards confirmed ; *Dick, &c. v. M'Ilwham, &c.* 15 May 1828, vi. S. 798. In consequence, no tutor or curator is now ever appointed to a minor or pupil, when no appearance is made for him ; *Calderhead's Trs. v. Fyfe and Marshall*, 26 May 1832, x. S. 582. As to the effect of a decree against a pupil undefended, see *Dick v. M'Ilwham*, 5 Feb. 1829, vii. S. 364 ; *Sinclair, &c. v. Campbell's Trs.* 3 Mar. 1835, xiii. S. 594 ; 17 July 1835, ii. S. and M'L. 103 ; 9 Mar. 1837, xv. S. 770, and 10 Mar. 1841, iii. D. 871. A curator *ad litem* to minors cannot discharge an action, *Stephenson, &c. v. Hay, &c.* 16 Jan. 1844, vi. D. 377. It is only in proper judicial proceedings, however, that it is necessary to take notice of the curators of a minor pubes. Thus it is unnecessary to certiorate them in extrajudicial acts, as warnings, *Bennet v.*

*Turnbull*, 12 July 1628, M. 2181; and arrestments may be effectually used in the hands of a minor alone; *Robertson v. Ker*, Nov. 1687, M. 2184. So also a requisition; *French and L. Thorndykes v. Cranston*, 3 July 1622, M. 2179. It was held a good objection, however, to a special charge, (*infra* P. iv. 9. 9), that the tutors and curators had not been charged; but the court did not annul the adjudication, only restricting it to a security; *Creditors of Maxwell v. Brown*, 22 July 1737, Elch. Adj. No. 13; see also *Robertson v. Crers. of Robertson*, 31 Jan. 1805, S. Dig. p. 1000, No. 1822.<sup>1</sup> A suspension has likewise been sustained executed against the minor alone, but the charge had been given in his own name, without concurrence of his curators; *Burgesses of Glasgow v. L. Lorn*, 1 Mar. 1627, M. 2180.

As a pupil has no *persona standi*, (*infra* p. 169), and is incapable of consent, it would appear that, in all proceedings, the tutors should be warned as well as the minor.

Where the pursuer, instead of citing the tutors and curators edictally and generally, cites certain persons by name, it lies on him to prove that these persons are the tutors and curators, should this be disputed; *L. Carnoussie v. L. Techmurie*, 17 Dec. 1629, M. 2181.

#### SECT. IV.—MARRIED WOMEN.

A married woman cannot in general sue without the concurrence of her husband, and it is doubtful if it is enough that he concurs after the case is brought into court; *Jeffrey v. Mathesons*, 28 June 1826, iv. S. 765, (N. E. 773); *Borthwick v. Grant*, 17 Feb. 1829, vii. S. 420; *Blair v. Burns, &c.* 17 Dec. 1829, viii. S. 264. Were she to obtain a decree in absence, in an action carried on in her own name alone, the

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<sup>1</sup> The reference in the Digest is to i. Bell's Com. 743, note 3. The case is to be found there, but quoted as an authority on another point.

decree would probably be held null. If the defender were to appear and obtain decree of absolutor, this decree would be no bar to a new action, as the husband was not in court to manage the process. But it would appear that a decree obtained in *foro* against the defender would be good, for otherwise the rule introduced for the wife's benefit would be turned to her prejudice, and the defender would be barred from stating the objection after decree, when he knew it during the dependence of the action. The concurrence must be set forth in the summons, and if disputed, must be proved. "If the husband, without reason, refuse to concur, or be incapable of concurring, on account of any disability, either legal, as forfeiture, natural, as fatuity, or accidental, as residing for the time in a foreign country; or if the suit is to be brought against her own husband, for securing to her the stipulations in her favour contained in the marriage contract, the judge will, of course, authorize any person she is pleased to recommend to concur with her, and carry on the action in her name. Yet a wife is not to be authorized to sue her husband except in necessary or urgent cases, *ex. gr.* if he be *vergens ad inopiam*, or if he has wilfully diverted from or thrown off his wife. Process is sustained at the suit of the wife, though no curator be authorized, where she sues her husband, after separation, for payment of a yearly sum which he had agreed to give her in name of alimony; for if her person be, in that case, so far recovered from her husband's power, that she is capable of enjoying the property of an alimentary provision, she must also be capable of holding plea for the recovery of that provision. To save the trouble of applying to judges for the authorizing of such actions, care is generally taken in marriage contracts to name some of the wife's nearest kinsmen, at whose suit execution may pass against the husband for performing his part of the articles;" Ersk. i. 6. 21; M. 6050, 51, and 54.

In the case of actions at the wife's instance on her contract of marriage, the mode of obtaining the concurrence of a tutor formerly was by petition to the court, who remitted to the Ordinary on the Bills to call and hear parties, and his Lordship, after hearing parties, and making up a minute of the facts, pronounced an interlocutor, authorizing the persons suggested to concur with the wife in all necessary processes against her husband, for implement and security of her provisions; *M'Pherson, Pet.*, 18 Jan. 1773, M. 6052, and other cases, *ibid.*

The court have allowed a married woman to carry on actions, without any concurrence, in various cases besides those for aliment mentioned above; as a reduction of her contract of marriage, *Inglis v. Aikit*, 8 July 1642, M. 6049, an action against her husband's brother for beating her, where her husband refused to concur, *Finlay v. Hamilton*, 5 Feb. 1748, M. 6051; see also *Graham, &c. v. Hunter's Trs.*, 4 Mar. 1831, ix. S. 543; *Alcock v. Barclay*, 5 June 1845, vii. D. 819; and diligence by inhibition, horning, and caption has also been allowed; but, when she sues, a curator *ad litem* ought to be appointed.

The curator *ad litem* is nominated when the cause comes into court, (*infra*, p. 425, note 1); *Taylor v. Kerr*, 1 Dec. 1829, viii. S. 151; *Hamilton v. Wylie*, 28 Feb. 1828, vi. S. 640; *Jobson v. Robertson*, 31 May 1832, x. S. 594; *Anderson, &c. v. Shand*, 8 June 1833, xi. S. 688. In *M'Kenzie or Cullen v. Ewing*, 19 Nov. 1830, ix. S. 31, a petition was presented to the court to appoint a curator *ad litem* after the action was in court, and the petition was remitted to the Ordinary to be disposed of. In that case, some doubt was expressed in the Court of Session, whether a wife could insist in an action of damages for slander without her husband's concurrence, as the damages, when recovered, would belong to him, and by refusing his concurrence, he virtually discharged all such claims; but a curator was ultimately appointed. The case was appealed, and it was decided in the House of Lords, that, with the assistance of her curator *ad litem*, she might maintain such

a suit, 24 Aug. 1833, vi. W. and S. 566. In *Milne or George v. Gauld's Trs.* 14 Jan. 1841, iii. D. 345, it was held that a claim for damages on account of wrongous imprisonment arising to a wife during the lifetime of her husband, passed under the *jus mariti*, as a moveable right accruing to the wife, and upon the death of the husband transmitted to his representatives; and consequently, that after the husband's death, the wife had no title to insist in an action concluding for pecuniary damages on the above account, and containing no conclusions of a personal or criminal nature. See a peculiar case, where the married woman and the curator *ad litem* differed in opinion as to the propriety of proceeding with a reclaiming note against an adverse judgment in the Outer-house; *Campbell or Graham, &c. v. Graham*, 4 Feb. 1843, v. D. 497.

Where the husband is abroad, the wife may be sued as if she were single, for necessities, or on business contracts into which she may have entered, *Churnside v. Currie*, 11 July 1789, M. 6082; *Orme v. Diffors*, 30 Nov. 1833, xii. D. 149; *Alcock v. Barclay*, *supra*; see *Rennie v. Ritchie*, 25 April 1845, Bell App. iv. 221. A married woman, whose husband was abroad under sentence of transportation, having been found entitled to pursue an action of count and reckoning with concurrence of a curator *ad litem*; and the defender's estates being sequestrated, was held entitled to claim and vote in the election of a trustee, without her husband's concurrence; *Paul v. Gibson*, 13 Feb. 1834, xii. S. 431; aff. 14 June 1834, vii. W. and S. 462.

When a married woman has raised an action regarding the price and rents of certain heritages in her own name alone, as if she were unmarried, and it is afterwards discovered that she is married, and the husband refuses to concur, the Ordinary will name a curator *ad litem*, even after the record is closed, with whose concurrence she may insist, so far as the conclusions relate to heritage or its surrogatum; *Blair v. Burns, &c.* 17 Dec. 1829, viii. S. 264. A woman, during the dependence of an action of damages at her instance against A, for defamation, raised a declarator of mar-

riage against B. who defended. A. moved that the pursuer's husband should be sisted as a party to the action of damages. The court appointed the pursuer's agent her curator *ad litem, valeat quantum*; *Hogg v. Landles*, 6 Mar. 1845, vii. D. 594.

The husband may renounce his curatorial powers, or right of administration, and his *jus mariti*, so as to validate the wife's separate deeds, *Murray's Trs. v. Dalrymple*, 5 Feb. 1745, M. 5842; *Keggie v. Christie*, 25 May 1815, F. C.; and in such cases it might be thought that a wife should be entitled to pursue in her own name alone, yet an exclusion of the *jus mariti* does not enable the wife to pursue in her own name, nor even the exclusion of the *jus mariti* and right of administration, nor a declaration that the fund is alimentary, and to be discharged only on her own receipt, *Borthwick v. Urquhart*, 26 Jan. 1827, v. S. 242, (N. E. 225), and 17 Feb. 1829, vii. S. 420; *Wight v. Dewar*, 9 Mar. 1827, v. S. 549, (N. E. 516). See however, *Graham v. Stewart*, 4 Mar. 1831, ix. S. 543.

As the husband is merely the curator of the wife, to give his consent to actions relating to her own property, and not her tutor, he cannot raise any such action without her authority. This is more especially true in all cases where she must take active measures to improve her situation. He cannot force her to reduce a settlement of lands to her prejudice, to pursue a declarator of bastardy or of irritancy against an heir of entail, or, in general, to challenge any title to lands by which she may get into possession; *Wedderburn's Trs. v. Colville*, 29 Jan. 1789, M. 10426.

The wife's concurrence must be proved if disputed; *Aitkins v. Orr*, 11 Feb. 1802, M. 16140. In *Ferguson v. Cowan*, 3 June 1819, Hume, 222, where an action was brought by a husband, in his wife's name, against his mother-in-law, to recover a tenement to which the wife had succeeded as

heiress, the wife would not concur, and it was found that she could not be forced, and that the action could not go on without her consent. But the case is different where the principal interest accresces to the husband; and all that is required is some matter of form to be done by the wife. Suppose a moveable succession devolves on her, this belongs to the husband *jure mariti*, as his wife's assignee, and therefore, like any other assignee, he may, in her name, or his own, claim the succession by confirmation. In an unreported case, *Webster and M'Intyre*, 11 Mar. 1820, the court found the husband entitled to expedite a confirmation, though there were mutual processes of divorce in dependence. A similar decision had formerly been given in a case reported by Elchies, *Husband and Wife*, No. 19; *A. v. B.* 29 Nov. 1743.

No action against a married woman can proceed until her husband be called, because he is her curator, Ersk. i. 6. 21; and any decree taken against her alone is null, *Spence v. Thomson, &c.* 9 Feb. 1739, M. 6080; neither can the parties waive the objection, *Freebairn, &c. v. Grant*, 8 Dec. 1749, M. 6080. But where the husband had been merely called for his interest in an action against his wife, it was held not necessary to call his representatives, on his death, during the dependence of the suit, *Murray v. Philip*, 2 Dec. 1843, vi. D. 159.

When a woman is married during the dependence of an action against her, her husband must be called before it can proceed farther; and the proper form of making him a party is by a supplementary action. Ersk. i. 6. 21, seems to think a diligence sufficient; but the husband has often the most material interest in actions against his wife, and as no proper defender can be called by a diligence, not even the tutors and curators of a minor, it seems improper to cite a husband in this form, *L. Forbes, &c. v. E. Kintore, &c.* 18 Feb. 1747,

M. 12083; *Dalgleish v. Hamilton*, 18 Feb. and 26 June 1752, M. 2184. The point, whether a woman who is a trustee can sue, without concurrence of her husband, will be found noticed, *Laird or Alison and Laird v. Miln and Ogilvie*, 16 Nov. 1833, xii. S. 54. It is no objection to the title of a woman to pursue, that there is a declarator of marriage depending against her, *Brown v. Proven*, (should be *Brown*), 23 May 1822, i. S. 426, (N. E. 396); aff. on merits, 3 Mar. 1830, iv. W. S. 28. See *Hogg v. Landles*, *supra* p. 149.

SECT. V.—FATUOUS AND FURIOUS PERSONS.

Fatuous and furious persons, when cognosced, seem in a situation similar to that of pupils. If a tutor has been appointed by gift from the Exchequer, the action proceeds in the joint names of the idiot and tutor; *Stewart v. Spreul*, 21 Jan. 1663, M. 6279. If not cognosced, it was at one time held, that the action might be raised in name of the fatuous person, and a tutor *ad litem* appointed when the case came into court. But in *Reids v. Duff, &c.* 19 Jan. 1839, i. D. 400, this practice, which had much to recommend it in point of consistency and conveniency, was expressly overruled by the court, who decided that an action was incompetently raised in the name of a fatuous person not cognosced, although brought with the purpose of having a curator *ad litem* named, as soon as the cause came into court. A curator bonis will be first appointed, in whose name the proceedings will run, *Mackenzie, Petr.* 21 Jan. 1845, vii. D. 283; see *Lindsay, &c. v. Watson*, 14 June 1843, v. D. 1194. The Committee of a lunatic appointed by the Lord Chancellor of England were held to have no title to pursue the lunatic's debtors here, though the action was supported by the subsequent concurrence of the lunatic; *Morison, &c. v. E. of Sutherland*, 21 June 1749, M. 4595, but the judgment was reversed on ap-



peal, 13 Feb. 1750, Cr. and St. 454. See *Gordon v. E. of Stair*, 8 July 1835, xiii. S. 1073. An action against a factor or curator for a fatuous person was held incompetent, without calling the fatuous person as principal defender; *Govan v. Thomson*, 20 Dec. 1814, F. C.

#### SECT. VI.—ALIEN AND ALIEN ENEMY.

Where the pursuer is an alien, the subject of a foreign prince, he can pursue no action relative to the property of lands in Scotland, as he is incapable of enjoying or succeeding to heritage in this country, Ersk. iii. 10. 10, B. Pr. § 2135, *Count Leslie v. Lady Forbes*, 8 June 1749, M. 4636, *Dundas v. Dundas*, 15 Nov. 1839, ii. D. 31; but he may pursue actions regarding moveables. A person is held to be a natural born subject, though born in a foreign state, if his father or grandfather be a native of this country, unless such ancestor was attainted, or banished beyond sea for high treason, or was, at the birth of such children, in the service of a prince at enmity with Great Britain. The children of aliens born in Britain are natural born subjects. Children of British parents, born abroad, must make their claim to any estate or interest within five years after it accrues; i. Blackst. 371, Ed. 1809, (373, Ed. 1844). The children of a British woman, born abroad, their father being an alien, could not formerly succeed to their mother's estate in England, *ibid.* 371, Ed. 1809, but now they may, 7 and 8 Vict. c. 66, (6 Aug. 1844), § 3. The treaty of Union, Art. 4, confers upon Englishmen all the rights which Scotsmen possess. An alien who had acquired by transfer, shares of the stock of the Bank of Scotland, has no right to the privileges of a naturalized Scotsman, in terms of a clause in the statute 1695, constituting the Bank, *Macao v. Officers of State*, 10 May 1822, i. S. App. p. 138. Interesting discussions on the status of parties, as affected by the separation of the American colonies from the mother country,

will be found in *Nisbet v. Nisbet's Trs.* 16 Jan. 1834, xii. S. 293, and *Dundas v. Dundas*, *supra*.

In the case of an alien enemy, no action can be carried on by him in our courts during the war, *Blomart v. E. of Roxburgh*, 17 Dec. 1664, M. 16091; *Arnauld and Gordon v. Boick*, 15 June 1704, M. 10159, although the debt may have arisen before it; *Carron v. Cowan and Co.* 28 Nov. 1809, F. C. If war break out during the dependence of an action, the court will *ex proprio motu* sist procedure; *Wright v. Hutchison*, 17 Jan. 1810, F. C. 437, foot note. Neither can an alien pursue indirectly by an Englishman who is in reality his trustee, *Carron*, *supra*. Nor can a native of this country pursue another native on his bill, if the pursuer has received the indorsation from an alien enemy after the pursuer knew of the war; *Johnston and Wright v. Goldsmith, &c.* 15 Feb. 1809, F. C. If the debt have arisen under a British license, the alien enemy has a right to pursue, *Mainwaring v. Baxter*, 4 Feb. 1812, F. C.; and an alien enemy legally in this country, and not liable to detention, who is pursued before our courts, may intent a counter action against the pursuer, without which justice could not be done betwixt the parties; *Burgess v. Guild*, 12 Jan. 1813, F. C. A British subject is entitled to pursue, though he reside in a foreign country at war with Great Britain; *Aitkens v. Crawford, &c.* 10 June 1813, F. C.

An alien is not only incapacitated from suing for his own debt, but as he has no *persona standi*, he cannot even pursue a surety or trustee for another; *Miller v. Allen*, 8 June 1792, M. 4651. The actions in such cases are merely sisted, not dismissed. Mr. Bell, i. Com. 306, suggests that steps may perhaps be taken to secure the debt until the issue of the war, as otherwise the greatest injustice might happen; but in the case of *Wright v. Hutchison, supra*, a demand for consignation was refused, though this appears sometimes to

be ordered in England; see opinion of counsel in *Burgess v. Guild, supra*.

SECT. VII.—MANDATARY, WHEN NECESSARY, &c.

Let us now consider in what cases it is necessary for a pursuer to have the concurrence of a mandatory. Where the party is within Scotland a mandate is presumed from the mere appearance of the advocate in court, and in the inferior court the procurator's possession of the parties' writings is a sufficient mandate; Ersk. iii. 3. 33; A. S. 11 July 1839, § 30; *supra* p. 79. An advocate is even entitled, without producing any mandate, to refer the matter in dispute to the oath of the adverse party,—a power no inferior procurator possesses, without a special mandate; A. S. 12 Nov. 1825, c. 9, § 11; A. S. 11 July 1839, § 84; *Hardie v. Allen and Husband*, 4 Jan. 1709, M. 12248, and other cases, *ibid*; see *supra* p. 79. Wherever the party, however, is not in Scotland, a mandate must be produced.

It never seems to have been disputed that a foreigner not in the country is bound to have a mandatory; and it has been long settled that a native whose principal residence is abroad, and who has no domicile here, cannot pursue without a mandatory, *Hope v. Mutter*, 10 June 1797, M. 4646; *Gordon v. Gordon*, 17 Dec. 1822, ii. S. 93, (N. E. 86). If the pursuer go abroad during the dependence of the process, the action (if the defender objects), cannot go on unless a mandatory be sisted, but a reasonable delay will be allowed for this purpose; *Turnbull v. Faul, &c.* 26 Nov. 1829, viii. S. 124; *Black v. Malcolm*, 25 Feb. 1830, viii. S. 599; *Langmuir v. Hunter*, 23 May 1834, xii. S. 633. During the dependence of an action by a foreign pursuer and his mandatory, the pursuer died; held still competent to decern against the mandatory for the defender's expenses, *Cairns v. Anstruther*, 15 Nov. 1838, i. D. 24; Aff. 16 Mar. 1841; ii. Rob. 29.

It was decided that a Scotchman, proprietor of lands in Scotland, does not require a mandatary while abroad, in *Smith v. Norval*, 24 May 1828, vi. S. 852, and *Ewing v. Hare and Glasgow*, 28 Nov. 1823, ii. S. 534, (N. E. 467), contrary to our older practice, — *v. Stuart*, 3 Feb. 1681, M. 353; although, if appearance had been made for such a proprietor, he was held not bound to sist a mandatary on leaving the country during the dependence of the process *sine animo remanendi*, *E. Melville v. E. Perth*, 10 Feb. 1693, M. 355; *E. Marchmont and Morison v. Home*, 7 June 1715, M. 358. But in these cases the point, of the parties being landed proprietors was not specially pleaded. In the later case of *Stalker v. Railton*, 12 Feb. 1831, ix. S. 434, an heritable proprietor who had left Scotland was appointed to sist a mandatary; and the same decision had previously been given where the party had an annuity payable out of a landed estate in Scotland; *Smith v. Countess of Strathmore, &c.*, 31 May 1828, vi. S. 903. In *Lockhart v. Ferrier*, 22 Dec. 1832, xi. S. 236, it was held that a mandatary is not necessary in raising inhibition on the dependence of an action by a party abroad, having a landed estate in this country. But the case was special. In another special case, *Dempster v. Potts*, 19 Dec. 1835, xiv. S. 189; the court ordered the party, though possessed of heritable property in Scotland, to sist a mandatary, and the same course was followed in *Fairley v. Sir William Elliot*, 19 Jan. 1839, i. D. 399, where the circumstances were also peculiar. It cannot be said that any fixed general rule has been established, that a party possessed of heritage in Scotland shall be exempted from the obligation of sisting a mandatary. It is apparent that in many cases the security thereby offered would be quite elusory.

In *M'Bain and Arbuckle v. Innes, &c.* 2 Mar. 1827, v. S. 505, (N. E. 475), a petition and complaint against an election of Magistrates presented in the name of a party who

was a native Scotsman, a resident burgher, and a constituent member of the meeting of election, but who at the date of the complaint was abroad in prosecution of his business, and without a mandatary, was held incompetent. In *Scott v. Gillespie*, 29 Jan. 1823, ii. S. 165, (N. E. 149), it was decided that a foreign seaman, domiciled with his family in Scotland, is not bound to sist a new mandatary in an action at his instance, on each occasion of sailing on a voyage *animo revertendi*, and in *Steel v. Steel*, 4 Mar. 1826, iv. S. 527, (N. E. 535), the Lord Ordinary (Eldin) found that a mariner, domiciled in Scotland, pursuing an action, was not bound to sist a mandatary when absent on a foreign voyage. See also the cases of *E. Melville*, and *E. Marchmont*, *supra*. It may, therefore, admit of some doubt, whether a person domiciled in Scotland, and abroad for merely a temporary purpose, as *e. g.* in the naval or military service of the country, is bound to sist a mandatary.

The mandatary, in the general case, must be responsible, but it is enough if he be in the same rank of life with the pursuer, *Scott v. Gillespie*, *supra*, (as the party is not bound to find a cautioner for the expenses), *Stephenson, &c. v. Dunlop, &c.*, 11 Dec. 1841, iv. D. 248, provided he be not bankrupt, *Duncan v. Duncan*, 4 March 1830, viii. S. 641; *Gifford v. Gifford*, 11 Feb. 1834, xii. S. 421; *Railton v. Mathews and Leonard*, 13 Nov. 1844, vii. D. 105; nor living in the abbey for the benefit of the sanctuary, *Turnbull v. Paul*, 26 Nov. 1829, viii. S. 124.

The object of requiring a mandatary being that a proper party may be in the field responsible for the due conduct of the litigation, and liable for expenses, if awarded, a mandate, qualified with the condition that the mandatary is not to be liable for past or future expenses, will not be received, *Pease v. Smith*, 4 June 1822, i. S. 490, (N. E. 420), unless the party be on the poor's roll, *Carling v. Campbell and*

*Chrystal*, 10 Mar. 1826, iv. S. 548; and the mandatary will not be liable for expenses if the party be on the poor's roll, even though the mandate be not so qualified; *Middlemas v. J. and G. Brown*, 9 Feb. 1828, vi. S. 511. In *Robertson and Co. v. Ezley, Dimsdale, and Co.*, 25 Jan. 1833, xi. S. 320, the court laid down as a general rule, that "a mandatary must be sisted simply. The law will prescribe his liability, and if he have any exceptions, he will not be precluded of them." A wife insisting against the trustee on her husband's sequestrated estate, must sist a mandatary responsible for expenses in the ordinary form; *Taylor v. Kerr*, 1 Dec. 1829, viii. S. 151.

The mandate must apply properly to the action in court, and should be probative or holograph; *Bonny and Mand. v. L. Gillies, &c.*, 13 Nov. 1829, viii. S. 13; see *Scudamore, &c. v. Lechmere*, 3 June 1797, M. 8559. A commissioner cannot appoint a mandatary for a principal out of the country, *Dempster v. Potts*, 18 Feb. 1836, xiv. S. 521.

It has long been settled, that the mandatary of a pursuer is liable in expenses; but it would rather appear he is not liable in damages if he act *bona fide*, *Cameron v. Russell*, 13 Dec. 1821, i. S. 211, (N. E. 200), 229; *Shirras v. Black*, 25 June 1824, iii. S. 183, (N. E. 123); see also *Davidson v. Megget*, 12 May 1821, i. S. 7, (N. E. 3); *Cowan v. Campbell*, 22 Feb. 1831, ix. S. 486. But see *Balle and Brink v. Benton, &c.*, 21 June 1763, M. 4036; viii. Bank. iv. 23. 15. In an action of divorce by a husband in India against his wife, residing in this country, on the head of adultery, the Lord Ordinary (Cuninghame) decerned against the pursuer's mandatary for the expenses awarded *ad interim*, to enable the defender to maintain her defence; *Hodge v. Philp*, (Summer Session, 1846, not reported).

The summons ought to be raised in name of the pursuer and his mandatary; but if no diligence is to be used

on the dependence, it is sometimes considered sufficient to produce the mandate *cum processu*. See *Kyd v. Fergusson and Walker*, 11 Mar. 1826, iv. S. 549, (N. E. 557). The doctrine embodied in the maxim, *Ratihabitio mandato æquiparatur*, has been given effect to by the court in various cases, *Ross v. Fisher*, 28 Feb. 1833, xi. S. 467; *Wylie v. Adam*, 5 Feb. 1836, xiv. S. 430; *M'Laine v. M'Laine*, 19 July 1844, outer house, (Lord Ivory, not reported). In the case, however, of petitions and complaints under the former election statutes, as they required to be presented complete within four months of the date of the act complained of, a mandatory could not be sisted beyond the four months; and where this was neglected, they were dismissed; *Stewart v. Grant*, 14 June 1831, ix. S. 727; see *M'Bain and Arbuckle v. Innes, &c.*, supra, and *Davidson v. Elphinston*, 6 July 1802, M. 8842, Aff. 18 April 1804, F. C. xiii. Apx. 8. It is not a good objection to proceedings *in foro*, that they have been carried on without a mandatory, as the defender ought to object; *Taafe and Mandatary v. Taafe and Moffat*, 22 Feb. 1822, i. S. 341, (N. E. 319).

The court, it is stated, (Th. on Bills, 2d Ed. 574), have, in two unreported cases, *M'Kie and M'Omish v. Hilliard and Co.*, 14 Nov. 1820, and 11 June 1822, second division, and *Stiven and Greig v. Bird*, 27 June 1822, first division, sustained diligence on bills without a mandatory, to the extent, at least of repelling the objection that no mandatory's name was inserted in the hornings;<sup>1</sup> but, in a former case, *Sir W. Johnston v. Jeudwine, &c.*, 23 Jan. 1813, F. C., arrestments laid on without a mandatory were found

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<sup>1</sup> See the report of *Mackie v. M'Omish*, apparently the former of these cases, (while in the Bill-Chamber), now given by Baron Hume, p. 281. The report is not very full, but it bears that a bill of suspension was passed of consent of the English creditor, on account of

null; and, in the case of *Kyd v. Fergusson and Walker*, supra, the judges of the Second Division were unanimously of opinion, that the want of a mandate was fatal to an inhibition; and they found the agent personally responsible with the party, for the expense of its recall. See also *Chambers or Moffat v. Chambers and Lorimer*, 8 June 1839, i. D. 911. In *E. of Caithness v. Eaton, Hammond and Son and Mandy.*, 5 July 1836, xiv. S. 1091, letters of inhibition having been applied for at the instance of a party in England, it was held no objection to the diligence, that the mandate to the party's agent in Edinburgh was dated posterior to the "fiat" on the bill, but prior to the signeting of the letters. A claimant in a Scotch sequestration, domiciled in England, is bound to sist a mandatary, *Ford*, 18 June 1844, vi. D. 1163; see also *Lockart v. Ferrier*, and *Taylor v. Kerr*, supra. In *Ewing v. Hare and Glasgow*, 28 Nov. 1823, supra, it was decided, that a creditor, who has an heritable estate in Scotland, is not bound to sist a mandatary; and the general practice was found on inquiry at the Signet Office to be, to raise the diligence (of inhibition), in his own name alone; see *Smith v. Norval*, and other cases, supra.

A defender is equally bound to sist a mandatary as a pursuer, as has repeatedly been found, *M'Coll v. Campbell*, 17 Jan. 1822, i. S. 246; *Fergusson and Co. v. Graham*, 22

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the irregularity of no mandate being produced. Through the kindness of Mr. Shaw, advocate, the author has had access to the notes taken by Mr. Ballantyne, advocate, at the advising of the latter case, *Stoen and Greig v. Bird*, (not reported). It would appear from them, that the matter of mandate was not brought under the notice of the court.

The question, whether diligence at the instance of a party out of the country can be done on Bills, without a mandatary, is at present before Lord Ivory, on minutes of debate. The result of the case will be stated in the Addenda at the end of the work.



Nov. 1825, iv. S. 219, (N. E. 221); *Grant v. Pedie*, 30 Nov. 1825, iv. S. 237, (N. E. 241); *Murray v. Little*, 24 Jan. 1829, vii. S. 316. A defender resident abroad must sist a mandatary, although his plea be that the court has no jurisdiction over him, *Ranken v. Nolan*, 26 Feb. 1842, iv. D. 832; and see a prior case, *Reoch or M'Lauchlan and Husband v. Rob and Mandatary*, 14 May 1831, ix. S. 588. A party domiciled out of Scotland, who had been liberated from a jail in Scotland, was held entitled to sue a *cessio*, though he was neither within Scotland, nor had sisted a mandatary, *Hossack v. Laidlaw*, 16 Dec. 1841, iv. D. 268. Where one is ordered to sist a mandatary, he will not be allowed to present a petition for leave to appeal against the order, without sisting a mandatary, *Elliot v. Fairly*, 2 July 1839, i. D. 1146. A reasonable time will be allowed to a defender abroad, as to a pursuer (*supra*, p. 154) to sist a mandatary, *Murray v. Murray and Laidlaw*, 8 July 1845, vii. D. 1000. The want of a mandatary, however, does not invalidate the proceedings; the pursuer is only not bound to go on without a mandatary, *Fergusson and Co.*, *supra*, &c. &c.

It was once found, in *Leigh v. Rose*, 19 Dec. 1792, M. 4645, that a mandatary for a defender is not personally liable in the expenses of process. In *Hamilton v. Laing*, 18 May 1822, i. S. 421, (N. E. 392), the mandatary of a suspender was found liable in expenses, *qua dominus litis*, as the bill had been presented in name of the suspender and the mandatary; though he maintained that a suspender was in reality a defender, for whom no mandatary was required, and that the mandatary for a defender is not personally liable in expenses. In another case, *Muckarsie v. Williamson*, 5 Mar. 1824, ii. S. 771, (N. E. 640), the court seem to have considered such a mandatary not liable in the general case, although "it was agreed by their Lordships that a defen-

der's mandatary may so conduct himself, as to make himself personally liable for expenses." In a later case, *Mowbray v. Leitch*, 8 Feb. 1825, iii. S. 505, (N. E. 352), the mandatary was found liable in expenses, subsequent to the date of his appearance; but a petition was appointed to be answered, as to his liability previously. And in another case, *Gray v. Fisher*, the same day, iii. S. 506, (N. E. 353), the court passed a bill of suspension to try the question. In a still later case, *Lindsay v. Lindsay and Mandatary*, 8 Feb. 1827, v. S. 310, (N. E. 288), the question was held as perfectly settled against the mandatary; see also *Reoch or M'Lachlan v. Rob and Mandy.*, 14 May 1831, ix. S. 588.

Although a defender consign a sum equal to the amount sued for, he must still sist a mandatary, *Brown v. Lindley*, 12 Nov. 1833, xii. S. 18. Where a party appeared personally in court, it was held that he was not bound to sist a mandatary, or to find caution for expenses, though he was resident in England, and it was alleged that he had come to Scotland expressly to attend the discussion, and thereby avoid sisting a mandatary, and was about to return to England as soon as the hearing of the case was over; *Clarke v. Neummarsh*, 13 Feb. 1836, xiv. S. 488. In *E. Hopetoun v. Horner, &c.*, 5 Mar. 1842, iv. D. 877, the mandatary offered for an English defender being held insufficient by the Lord Ordinary and the court, the defender offered personally to attend all diets in the case, and the court, on his finding security to the amount of £50 to do so, found him entitled to reasonable notice of all diets, and dispensed with his sisting a mandatary. In *Railton v. Mathews and Leonard*, 17 July 1844, vi. D. 1348, those two cases were anxiously pleaded as precedents by a Scotchman domiciled in England, carrying on an action in the Court of Session, and offering to find caution to attend all diets of court on reasonable notice; but

the court refused effect to his plea, and ordained him to sist a mandatory in the usual way.

When a mandatory wishes to withdraw, he must enter a minute on the record to that effect; and it is not enough that his name is omitted in the proceedings; *Neilson v. Wilson*, 13 Feb. 1822, i. S. 314, (N. E. 290); *Martin v. Underwood*, 8 June 1827, v. S. 783, (N. E. 730); see *Anderson v. Bank of Scotland*, 22 Jan. 1836, xiv. S. 316. After he has withdrawn, if no other mandatory be named in a reasonable time, the court will pronounce decree of absolver, or in terms of the libel, and find the party and mandatory, conjunctly and severally, liable in expenses; *Robb v. Middlesex Insur. Co.*, 11 Mar. 1843, v. D. 1025; *Cairns*, supra, ii. Rob. 29. After this judgment, the mandatory is not entitled to carry on the action, to shew that no expenses would have been awarded; for he is neither in the situation of a cautioner for the subject matter of the suit, nor of a law agent, who, after gaining the cause of his client, has been allowed to shew, that expenses would have been awarded in his favour, though the parties themselves have settled the action extrajudicially; *Gordon v. Gordon*, 11 Dec. 1823, ii. S. 572, (N. E. 493); *Henderson v. Gilfillan*, 20 Feb. 1834, xii. S. 468.

With regard to the subject of judicial mandates generally, it may be remarked, that two points are distinguishable, (1.) the production of a mandate or written evidence that the absent party has authorized the proceedings taken in his name; and, (2.) the sisting of a mandatory in process responsible for the proper conduct of the litigation, and liable, in the general case, for expenses, if awarded. This distinction appears to have been occasionally overlooked in the cases which have occurred. It is not easy to reconcile all the decisions, or to arrange the whole of them as establishing certain general rules.

## SECT. VIII.—DEFENDER FORTH OF SCOTLAND.

Where the defender is a stranger forth of Scotland, and having moveable funds, or debts only due to him in Scotland, no action can proceed against him, till these funds or debts are attached by an arrestment *jurisdictionis fundandæ causa*.<sup>1</sup> This arrestment, though laid on by the authority of an inferior judge, founds sufficiently the jurisdiction of the Court of Session, Ersk. i. 2. 19; and, indeed, except in real actions, at common law, inferior courts have no jurisdiction over persons out of their territory;<sup>2</sup> and the action must therefore be brought in the Court of Session, however small the sum claimed, as the only competent court; *Stuart v. Scot*, 14 July 1697, M. 4817; *Burns and Mandy. v. Purvis and Mandy*. 13 Dec. 1828, vii. S. 194; *Harvey, Hall, and Co. v. Black and Son*, 21 June 1831, ix. S. 785; *Burns v. Monro*, 18 July 1844, vi. D. 1352; *White v. Spottiswoode*, 30 June 1836, viii. D. 952, see *supra* p. 7. Arrestment *ad fund. jur.* is, of course, equally necessary, whether the debt be constituted or not. Thus, suppose a Scotsman settled *animo remanendi* in a foreign country, comes to Scotland to purchase goods, for which he grants bill, an arrestment on the bill, without a previous founding of a jurisdiction, is null; *Harvey, Hall, and Co. supra*. To sustain the arrestment, it is sufficient that there be *prima facie* evidence of funds in the hands of the

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<sup>1</sup> "This manner of founding jurisdiction was introduced by the lawyers of the Netherlands, a commercial country, and divided into many independent states. It seems highly reasonable, and is approved by all our writers."—*Tait's MS.* "*Arrestum jur. fund. gratia.*"

<sup>2</sup> By 1 Wm. IV. c. 69, § 22, parties furth of Scotland are amenable to the sheriff's maritime jurisdiction. In *Kennedy v. Ker*, 10 Mar. 1838, xvi. S. 990, the statutory jurisdiction conferred upon sheriffs in cases of *cessio bonorum*, was held to extend to foreign creditors.

arrestee; and if there be such evidence, a preliminary defence that it will be found on investigation that there are no funds, will not be sustained, *Douglas v. Jones*, 30 June 1831, ix. S. 856; see also Lord Corehouse's observations in *Kirkpatrick v. Irvine, &c*, 23 June 1838, xvi. S. 1200. An arrestment *jur. fund. c.* by a party for himself, and as trust-assignee for others, held not effectual as to a cedent not named in the warrant of arrestment, although mentioned in the summons, and the arrestment on the dependence; *Bertrams v. Barry and Bruce*, 6 Mar. 1821, F. C. An arrestment *jur. fund. c.* against a foreign firm of "J. H. and Co." may be competently laid on, in said firm name alone; *Forsyth v. Hare and Co.*, 18 Nov. 1834, xiii. S. 42. On the death of a defender against whom jurisdiction had been effectually founded by arrestment *jur. fund. c.*, and arrestment had followed in the dependence, an action of transference was held incompetent against his executor, who resided abroad, as to whom no jurisdiction had been constituted by arrestment or otherwise; *Cameron and Mandy. v. Chapman and Mandy*. 9 Mar. 1838, xvi. S. 907. Execution upon a decree may follow after the debtor loses his Scotch domicile, without arrestment *jur. fund. c.*, and if the property of a party is validly arrested upon a decree, no farther arrestment will be required to found an action of furthcoming, although he may have lost his Scotch domicile; *Burns v. Monro*, 18 July 1844, *supra*. Where an agent has been employed by a foreigner to raise an action in this country, the agent may probably be entitled, by reconvention, without arresting *ad fund. jur.*, to pursue him for payment of his expenses, on the ground that the foreigner, by bringing his action in our courts, has thereby subjected himself to their jurisdiction, in so far as the agent's claim for these expenses is concerned; but the mere circumstance of a foreigner lodging a claim in a sequestration, does not entitle the agent in the sequestration to pursue him with-

out arresting *jur. fund. c.*, *Smyth v. Ninian*, 16 Nov. 1826, v. S. 8, (N. E. 7); and the objection may be stated by an arrestee, who is bound to see that the proceedings are correct, before he can pay with safety, *Ibid.* It is no objection to this jurisdiction, that both parties are resident abroad, and that the ground of action arose there, *Oswald v. Patison*, 14 Dec. 1826, v. S. 127, (N. E. 116); *Hailes*, 526; (*Ashton, Hodgson, and Co. infra*); *Anderson and Child v. Wood*, 18 Jan. 1809, Hume, 258; *Gray and Illidge, &c. v. Polhill, &c.* 29 May 1847, ix. D. 1146.

In other cases action may be sustained without any arrestment, on the doctrine of reconvention, the principle of which is, that no person can avail himself of the jurisdiction of our courts, without subjecting himself to it, at least in all incidental claims. It is necessary, in such situations, to cite the foreigner himself, and not his mandatary merely; *Stewart v. Lumsden*, 2 July 1829, vii. S. 820. It is necessary to allow the application of the doctrine of reconvention, that the actions be between the same parties, or be connected with each other; for the mere raising of an action before our courts does not give them a general jurisdiction over the foreigner, *Ashton, Hodgson, and Co. v. Mackrill, &c.*, 17 June 1773, M. 4835; *Smyth v. Ninian*, *supra*; *Vans v. Sandilands, &c.*, 18 Nov. 1675, M. 4840; *White v. Spottiswoode*, 30 June 1836, viii. D. 952; *Ord v. Barton and Mandy.*, 22 Jan. 1847, ix. D. 541.<sup>1</sup> But it is not sufficient

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<sup>1</sup> A buyer sued in the sheriff court of Banffshire by an English house for payment of the price of commodities furnished, was held entitled, as a set off, to reconvene his adversaries in the same court, in an action of damages for failure to deliver articles in terms of another contract; *Richards and Co. and Mandy. v. Grant*, 1843. When the case was brought by advocacy before Lord Wood, the judgment of the sheriff (Currie) on this point was acquiesced in.

to entitle a person to pursue a reduction improbatum of a will executed in England, and deposited in Doctors' Commons, that the defender is a native of Scotland, is possessed of lands here, and is pursuing an adjudication of the estate of the pursuer of the reduction, *Ross v. Ross*, 26 Nov. 1782, M. 4600.

Where a joint stock company has its principal seat in England, but a branch, and some of its partners, in this country, it is competent to sue the company in our courts, without an arrestment; and citation may be given, by leaving a copy with the agents, and citing some of the partners in this country personally; *Bishop and Mandy. v. Mersey and Clyde Navigation Co.*, 19 Feb. 1830, viii. S. 558.

An English joint stock company having an agent in Scotland, may also be sued, though none of the partners be resident here. The method followed in one case, was to arrest *ad fund. juris*, and to raise an action against the directors, proprietors, and secretary, and their agent, and conclude for decree against the company and agent, conjointly and severally, see *Albion Insurance Co. v. Mills*, 27 June 1828, iii. W. and S. 218.

In some cases, arrestment is unnecessary, as where the fund being already in court, is sufficiently secured, as in a multiplepinding, *Mansfield, Ramsay, and Co. &c. v. Smith, &c.*, 17 June 1795, M. 2594; *Miller v. Ure*, June 23, 1838, xvi. S. 1204; or where a foreigner and his mandatary were summoned under 33 Geo. III. c. 74, § 6, to contribute a proportion of the proceeds of poinded effects; *Black and Knox v. Ellis and Sons*, 7 June 1805, M. Apx. Foreign, No. 7. Where a party, not resident in Scotland, has lands here, it was held a matter of some doubt whether he is thereby liable to actions for personal claims of debt. The case of *Haldane v. York Buildings Co.*, 29 Dec. 1724, M. 4818, is not precisely in point, for the company, by having an office in Scotland,

was perhaps rendered amenable to the jurisdiction of our courts. Various decisions will be found in M. 4812, et seq., on both sides of the question; Ersk. i. 2. 18 and 19. It has now, however, been solemnly settled, that it is unnecessary to arrest in the above circumstances; *Ferrie and Fairly v. Woodward, &c.*, 30 June 1831, ix. S. 854; and see *Kirkpatrick v. Irvine*, 23 June 1838, xvi. S. 1200; *Cruickshank v. Cruickshank*, 24 Feb. 1843, v. D. 733. The question whether an Englishman, by holding a lease of heritage in Scotland, is thereby subjected to the jurisdiction of our courts, will be found noticed, though not determined, in *Douglas v. Jones*, 30 June 1831, ix. S. 856.

A party, resident and domiciled abroad, is subject to the jurisdiction of the Court of Session, if he be apparent heir to an estate in Scotland, though he has not made up his titles, nor entered into possession, *M'Arthur, &c. v. M'Arthur*, 12 Jan. 1842, iv. D. 354. In *Burns v. Monro*, 18 July 1844, vi. D. 1352, it was held that execution upon a decree may proceed after the debtor has lost his Scotch domicile, without an arrestment *jur. fund. c.*—and that the effects of a party being validly arrested upon a decree, no farther arrestment is necessary to found an action of furthcoming, though, before it is brought, he may have lost his Scotch domicile.

An arrestment *juris. fund. c.*, of funds as belonging to the executors nominate of a foreigner deceased, not confirmed by these executors, was held to be inept as the ground of a decree of constitution and payment against the executors; *Houston, &c. v. Stirling, &c.*, 3 Feb. 1824, ii. S. 672, (N. E. 564), aff. 20 May 1825, i. W. S. 199. The mode of proceeding against the funds of a deceased debtor, whose executors are foreigners, is to arrest *ad fund. juris.* and then to raise an action concluding for decree *cognitionis causa* merely. On this ground of debt, the creditor may apply to be confirmed executor creditor; *Ibid.*; *Ashton, &c. v. Mackrill*, 17 June



1773, M. 4835, Hailes 526. By 4 Geo. IV. c. 96, (19 July 1823), intestate succession now vests in the next of kin by mere survivance. Where a fund in Scotland was specially bequeathed by a foreign will to foreign executors, to pay specific legacies in Scotland, an arrestment of that fund, *juris fund. c.*, by the legatees against the executors was held effectual, though the latter had not been confirmed, such bequest being considered a special assignation, within the meaning of the act 1690, c. 26, (c. 56, Th. Ed. ix. 198); *Inverarity and Co. v. Gilmore*, 7 Mar. 1840, ii. D. 813.

As this jurisdiction has been introduced to facilitate the recovery of debts, it is properly a mercantile, and not a universal jurisdiction. It will, therefore, not entitle our courts to judge in a question of *status*, as in a declarator of marriage, although the summons may conclude for aliment and expenses; for these last claims are only consequent on the establishment of the status of husband and wife, and the declaration of this relation is the primary and proper object of the action; *Scruton v. Gray*, 1 Dec. 1772, M. 4822. Neither will it give a jurisdiction to the courts of this country, against an executor resident in a foreign country, where the office falls to be executed, to the effect of calling him to account here for the execution of his office; *Brown's Trs. v. Palmer*, 17 Dec. 1830, ix. S. 224. But an executor, under an Indian will, residing in England, having been confirmed in this country, where part of the executry funds were, the competency of an action against him regarding these funds, proceeding on an arrestment of them *juris fund. c.*, was sustained; *M'Morine, &c. v. Cowie and Mandy.*, 16 Jan. 1845, vii. D. 270. Where proceedings in this country would be attended with inconvenience, the court will recommend recourse to the foreign forum; *Tulloch v. Williams*, 6 Mar. 1846, viii. D. 657.

The circumstance that the defender is a Scotsman by birth, if domiciled out of the country, gives our courts no jurisdic-

tion over him, even although Scotland be the *locus contractus*; *Pedie v. Grant*, 14 June 1822, i. S. 495, 533, (N. E. 460), reversed on appeal, 5 July 1825, i. W. S. 716. In *M'Arthur, &c. v. M'Arthur, supra*, the court expressed an opinion that it is not sufficient to create jurisdiction against a party domiciled abroad, that he was born in Scotland, or that the debt sued for was contracted in Scotland, or that both these circumstances concurred. A foreigner will be amenable to the jurisdiction of our courts where the claim arises *ex delicto*, *Crowder or Turneley v. Watson*, 18 Nov. 1831, x. S. 29.

SECT. IX.—CAPITAL CONVICT, OUTLAW, ASSUMPTION  
OF TITLES, &c.

After a person has been condemned to death for a capital crime, he is dead in law; and having lost what is termed a *persona standi in judicio*, cannot appear either as pursuer or defender in a court.<sup>1</sup> An outlaw, one who has been fugitated, for not appearing to answer the charges against him in a criminal court, has also lost his *persona standi*; he cannot be allowed to appear until reponed, and he will be decerned against as in absence; *Cheyne and Mackersy v. Anderson*, 4 July 1828, vi. S. 1061, ii. Hume, 125, 271, and Bell's Notes, 228, *Marshall, &c. v. Irvine, &c.* 11 Dec. 1834, xiii. S. 179, foot note. It would rather appear, however, that if the party be reponed, after bringing an action, he may be allowed to proceed with it, even where the interest of third parties is concerned; *Black v. Kennedy and Cameron*, 29 June 1825, iv. S. 124, (N. E. 125). See *Anderson or Bain, &c. v. Shand*, 8 June 1833, xi. S. 688. The effect of a party being at the horn, as affecting his right to sue or defend, will be found exemplified

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<sup>1</sup> *Persona standi* applies to the status of a party, as entitled to insist or defend in actions generally. A title to pursue applies to particular actions, and requires, besides the general qualification of having a *persona standi*, that the party have both a title and an interest to urge the particular suit.

in a variety of cases. *M. voce Persona Standi*, and *Elchies Persona Standi*, No. 2.

Where a title of Baronetcy had been forfeited in the person of a predecessor, the court refused to give judgment on a pleading lodged under the forfeited title, *Sir Al. M'Donald*, 6 Jan. 1740, *Elch. Persona Standi*, No. 1, and Notes. The title of "one of the Bishops or senior clergyman of the superior order of the Episcopal communion in Scotland," was ordered to be erased from a summons, as not recognized by the court, as a *nomen juris*; *Abernethy Drummond v. Farquhar, &c.*, 6 July 1809, F. C. But see 3 and 4 Vict. c. 33, (23 July 1840). A party, describing himself as Chief of a clan, and not libelling any other title, was held not entitled to pursue another for rent alleged to be due for a particular farm, "possessed by the defender or her sub-tenants under the pursuer," *Mackintosh v. Mackintosh*, 8 June 1835, xiii. S. 884. The title of "Lord" Provost, assumed in pleadings by the chief magistrate of Aberdeen, was ordered by the court to be withdrawn, *Synod of Aberdeen v. Milne's Trs.*, 25 Feb. 1847, ix. D. 745, foot note. "The trustees of A. B.," without any specification of individual names and designations, is not a *nomen juris*, under which parties can sue or defend, or use diligence, *Bell v. Trotter's Trs.* 20 Jan. 1841, iii. D. 380; *Milne's Tr.*, 12 Nov. 1842, v. D. 68. It was once found, that the court could not entertain an action raised under the title of a peer, whose right had never been recognized by any competent tribunal, and was very doubtful, *Alexander v. Lord Advocate*, 26 Jan. 1830, viii. S. 404; but, on a consultation of the judges, in the case of the same pursuer, an opposite decision was afterwards pronounced; *E. of Stirling v. Officers of State*, 9 Feb. 1831, ix. S. 413.

#### SECT. X.—SEQUESTERED BANKRUPT, &c.

Where a person has been sequestrated, or has granted a

trust-deed of his whole property to a trustee for creditors, he cannot in the general case, sue, unless he sist his trustee, or find caution for expenses; for, as it is the duty of the trustee to make available all claims competent to the bankrupt, it is to be presumed, when he does not appear, that the action is groundless, *Galloway v. Jeffrey*, 26 Nov. 1822, ii. S. 41, (N. E. 36), and cases there cited; and the trustee will not be allowed to sist himself under the qualification that he is not to be liable in expenses; but he may do so under the reservation of all questions as to his liability; *Buchanan v. Corbett*, &c. 15 June 1827, v. S. 805, (N. E. 745). Although the cause of action arise subsequently to the sequestration, the bankrupt must have the concurrence of the trustee, or find caution for expenses, *Love v. Hunter*, &c., 10 Feb. 1835, xiii. S. 448. It was decided that it does not make any difference that the sequestration is so nearly terminated that the trustee has been authorized to apply for his exoneration, and that there are sufficient funds in his hands to pay all the debts, *Lyell v. Mudie*, 1 Dec. 1829, viii. S. 153; and the court also held that a bankrupt, when called as a defender, is equally bound to sist his trustee, or find caution; *Sir W. C. Fairlie's Trs. v. Taylor*, 6 Mar. 1830, viii. S. 666. But this case was reversed upon appeal, 1 Mar. 1832, vi. W. S. 301. See also *Russel v. Chrichton*, 5 Mar. 1839, i. D. 617. In *Bell v. Forrest*, &c. 17 July 1840, ii. D. 1460, a bankrupt under sequestration was allowed to be heard, without finding caution for expenses, although the trustee declined to sist himself. The general rule is thus subject to limitation, when the circumstances of the case call for its relaxation. The court proceeds upon equitable principles as applicable to each case, and will modify the caution to be found, so as to meet the justice of the particular circumstances; *Maxwell, &c. v. Maxwell, &c.* 3 Mar. 1847, ix. D. 797; *Walker v. Kelty's Tr. &c.* 21 June 1839, i. D. 1066. Where the object of the pursuer is to at-

tach the person of the bankrupt, he will be allowed to defend the action, or suspend the diligence, without sisting his trustee, or finding caution, Bell's Com. ii. 434, (5th Ed.), *Clerk and Ross v. Ewing*, 20 May 1813, F. C.; and if the action against the defender be founded on an allegation of fraud, he will also be allowed to defend without finding caution; *M'Intosh v. Cooper*, 29 June 1826, iv. S. 775, (N. E. 783). A sequestrated bankrupt was allowed to maintain his defences against an action of damages for seduction, without finding caution for expenses, *Robertson v. Henderson*, 19 Nov. 1833, xii. S. 70.

In some cases, even the onerous assignee of a bankrupt pursuer will be ordained to find caution, as where the assignation of the ground of action was made in favour of a common labourer, after the bankrupt had been ordered to find caution; *M'Ghie v. Donaldson*, 1 June 1832, x. S. 604. The general rule is equally applicable, where the object of the bankrupt is to have the sequestration recalled, as irregularly awarded, *Manuel and Co. v. Bain*, 21 Jan. 1826, iv. S. 381, (N. E. 384); see also *Muckarsie v. Magistrates of Falkland*, 16 June 1832, S. Jur. iv. 520. Where the bankrupt, however, finds security for the expenses, he is entitled to proceed with his action, *Laidlaw v. Dunlop*, 14 Jan. 1830, viii. S. 307; and after he has obtained a discharge, he is entitled to sue, in the same manner as if he had never been bankrupt; *Donald v. Dick*, 12 June 1821, i. S. 64, (N. E. 64); *Reid v. Wilson*, 27 May 1825, iv. S. 38, (N. E. 39); *Russel and Co. v. Stewart*, 22 Jan. 1829, vii. S. 302; *Megget v. Scoular*, 24 Jan. 1832, x. S. 233. A bankrupt, sequestrated under 33 Geo. III. c. 74, (17 June 1793), was discharged on a composition; he thereafter obtained decree against a trustee (who had resigned pending the sequestration) for a sum remaining due under his intrusions; he then raised action against a cautioner of the trustee, who objected to his title, that the bond of

caution was in favour of the creditors only, and not of the bankrupt; held by a majority of the whole court, that there was a good title to pursue, *Bell v. Curstairs, &c.* 17 Dec. 1842, v. D. 318. Special circumstances may occur in which the bankrupt, though not formally discharged, may be allowed to sue, without finding caution for expenses, *Young v. Watson*, 19 May 1836, xiv. S. 794. See also *Forbes v. L. Duffus, &c.* 30 June 1842, iv. D. 1469. A bankrupt after his discharge was held not entitled to sue for a debt alleged to have been owing prior to the sequestration, where his discharge was on a composition contract, and his estates had been with his consent conveyed to a private trustee for relief of the cautioners, under the composition contract. The concurrence of the trustee was held necessary, *Megget v. Campbell*, 4 June 1833, xi. S. 675.

#### SECT. XI.—PERSONS UNDER TRUST.

A person who has obtained a cessio, and granted a disposition *omnium bonorum*, has been held to have no title to pursue without a retrocession; *Geddes v. Barry*, 11 June 1822, and 8 July 1823, i. S. 480, (N. E. 446), and ii. 461, (N. E. 412); and see *Hay v. Collier*, 31 May 1834, xii. S. 659. On his obtaining a retrocession, however, he is entitled to proceed with his action, as he is all along possessed of the radical title, and though encumbered by the disposition *omnium bonorum*, this encumbrance is taken off by the retrocession; *Same parties*, 14 Nov. 1829, viii. S. 53. See also *Johnston v. Henry*, 4 June 1836, xiv. S. 885, and *Gavin v. Greig, &c.* 10 June 1843, v. D. 1191. The above doctrine was confirmed in the case of *Gilchrist v. Fife and Proctor*, 24 Nov. 1847, x. D. 149. Although there may be no prospect of a reversion to the bankrupt under a process of cessio, he has a right and interest to complain of any wasteful neglect of his estate, *Macvey v. Risk*, 8 June 1833, xi. S. 691. Trustees

*omnium bonorum* of an arrestee, were held entitled to defend a forthcoming directed against him personally, and not against his trust-estate, though the arrestee disclaimed the defence, *Carrick v. Hutchison*, &c. 12 June 1844, vi. D. 1148.

SECT. XII.—EFFECT OF PROCEEDINGS IN A FOREIGN COUNTRY.

The effect of diligence being determined by the law of the country where it is meant to operate, proceedings here cannot be stopped, because analogous proceedings could not be carried on in a foreign country. Thus, although by the law of England, a creditor could not both incarcerate his debtor and attach his effects; yet an English creditor, who had imprisoned his debtor in England, was found entitled to attach his property in Scotland, by arrestment and forthcoming; *Lashley v. Morland*, &c. 21 Dec. 1809, F. C.; the court, proceeding on the footing that imprisonment in England was not held to be a discharge or extinction of the debt. But in *Gordon v. Gordon*, 12 Nov. 1818, F. C., this view being negatived by the opinion of English counsel, it was held, that, where the judgment of an English court has received execution by imprisonment of the party, in a writ of *capias ad satisfaciendum*, such execution bars action in Scotland for payment of the debt. In *Lashley's* case, the court also laid down the general principles, that, as regards the validity and existence of debts, the *lex domicilii et loci contractus* must furnish the rule, while the nature, extent, and effect of the diligence must be governed by the peculiar laws of the place where it is sought.

It is a general rule of law, that wherever a debt is discharged by the law of one country, it must be discharged in every other. There can be no doubt of this in the case of a particular discharge, which can be pleaded by the debtor, and the principle was generally admitted in the case of discharges occurring in England under a commission of

bankrupt, or in Scotland under a sequestration, where both parties resided, and the debt had arisen in the country where the discharge had been obtained. But where the debt was Scottish, and the debtor had been discharged in a foreign country, the effect of this discharge on the claim of the Scottish creditor, was formerly considered as doubtful; see Bell's Com. ii. 688, and cases there cited. In one case, *Watson v. Renton*, 21 Jan. 1792, Bell's 8vo Cases, 92, a distinction was made between English and Scottish debts, but the soundness of this view was called in question in a later case; *Strother v. Read, &c.* 1 July 1803, M. voce For. Comp. Apx. No. 4. In the case of the *Royal Bank v. Assignees of Smith, Stein, and Co.*, 20 Jan. 1813, F. C. 90, and Buch. 358, it was held, that wherever the proceedings in bankruptcy included the debtor's whole estate, his discharge in that bankruptcy was effectual in Scotland; but this principle had been overlooked, or disregarded in *Watson's* case. In *Rose v. McLeod*, 13 Dec. 1825, iv. S. 308, (N. E. 311), a debt contracted and payable in Berbice was held not to be discharged by a certificate under an English Commission of Bankruptcy, but the soundness of this decision, and of the above case of *Watson*, in so far as it was there found that a debt payable in Scotland was not discharged by the Lord Chancellor's certificate, has been questioned, More, 8; and the principle is now admitted in international law, that where an absolute discharge is provided from all acts and remedies of the creditors, as part of the system of bankrupt laws of a country, the whole obligation of the contract is deemed *ipso facto* discharged.—Story's Conflict of Laws, 2d Ed. 1841, § 338. By § 123 of the Sequestration Act, 2 and 3 Vict. c. 41, (17 Aug. 1839), a discharge under it is declared to operate as a complete acquittance to the bankrupt of all debts and obligations contracted prior to the



date of the sequestration, and the effect of the discharge is declared to extend to all Her Majesty's dominions.

A party pursuing his debtor in the English courts, will not be precluded from insisting against him in Scotland, to the effect of making good a security over his property situated in Scotland, *Munro v. Grahame*, 4 July 1839, i. D. 1151, *Hawkins, &c. v. Wedderburn, &c.*, 9 Mar. 1842, iv. D. 924; *Fordyce v. Bridges*, 2 June 1842, *ibid.* 1334. See *infra* Sect. xxi. *Lis alibi pendens*. It has also been held, that the English Bankrupt Acts have no retrospective effect in Scotland to cut down prior diligence, *Hunter and Co. v. Palmer and Wilson*, 25 Feb. 1825, iii. S. 586, (N. E. 402). But see *Lindsay v. Paterson*, 10 July 1840, ii. D. 1373.

#### SECT. XIII.—INCORPORATIONS—KIRK-SESSIONS.

The manner in which incorporations are to sue and be sued, is in general pointed out in the act of Parliament, charter, or seal of cause incorporating the body, and where this is omitted, the proper method seems to be to use the corporate name, by which the artificial person, the corporation, is distinguished, i. Blackst. 475, (Ed. 1844); Ersk. i. 7. 64; Bank. i. ii. 27; see *Fisher and Hepburn v. Syme, &c.*, 7 Dec. 1827, vi. S. 216; Arg. *Bow*, *infra*. Where no charter exists, the office-bearers cannot pursue in their own names simply, without the authority, and for behoof of the corporation; *W. S. v. Graham*, 13 Feb. 1823, ii. S. 214, (N. E. 190), as reversed on appeal, 21 June 1825, i. W. and S. 538, *supra* p. 91. But a corporation, as well as an individual, may appoint a commissioner to sue for their behoof, in virtue of a corporate act of the body, and any individual having an interest in a charitable fund may sue the managers to account for their administration; *Bow v. Patrons of Cowan's Hospital*, 6 Dec. 1825, iv. S. 276, (N. E. 280); see *supra* p. 30;

and, where no quorum is fixed, the majority must be present to make a legal meeting; *Meiklejohn, &c. v. Masterton, &c.*, 28 May 1805, M. Apx. Burgh Royal, No. 17. In an action of slander at the instance of the officers of a corporation, for the corporation, and themselves as individuals, it was held that, as the slander was not directed against the corporation, they were not entitled to sue in their corporate capacity, but each individual must sue for the injury done to himself; *Fleshers of Dumfries v. Rankine*, 10 Dec. 1816, F. C.; see *Williams v. Allan and Watson*, 20 Feb. 1841, iii. D. 600. In a question as to exclusive privileges, (not then abolished), it was held not a relevant objection to the title of a corporation to challenge encroachments, that none of the members of the corporation at the time, actually manufactured the articles in question; *Simpson and Graham v. Hammermen of Edinburgh*, 9 June 1830, viii. S. 903. Such complaints might be in a summary form, *ibid.*

A Kirk-session has been held to be an incorporation, in as far as concerned the management of the poor's funds, or funds left for a charitable purpose; *The Minister, &c. of Dalry v. Newal, &c.*, 17 Nov. 1791, M. 14557; *E. of Galloway, &c. v. Minister and Kirk-session of Dalry*, 22 Feb. 1810, F. C.; see also *Magistrates of Perth v. The Presbytery*, 6 Mar. 1730, Craigie and Stewart, App. 39. But in the case of *The Kirk-session of North Berwick v. Sime*, 16 Nov. 1839, ii. D. 23, where a summons bore to be at the instance of the kirk-session of a parish, and of the members thereof individually, at the suggestion of the court, an amendment of the libel was consented to by the pursuers, to the effect that the summons should be at the instance of the individual members of the session *nominatim*, for themselves, and as comprising the kirk-session; the kirk-session *per se*, not being a corporation. A corporation may be created by a seal of cause, which will enable their office-

bearers to sue, *Begbie, &c. v. Brown*, 26 Jan. 1776, M. 7709, compared with *W. S. v. Graham*, *supra*; and even without a seal of cause, long usage is sufficient to create an incorporation, or at least a charter may be presumed from the immemorial enjoyment of the privileges of an incorporation, where there is no evidence of the original constitution of a society, *Wrights of Glasgow v. Cross*, 8 Mar. 1765, M. 1961; see *Dempster v. Masters and Seamen of Dundee*, 21 Jan. 1831, ix. S. 313.

A very important statute with reference to an extensive class of corporations was lately passed. It is entitled, "An act for consolidating in one act, certain provisions usually inserted in acts, with respect to the constitution of companies incorporated for carrying on undertakings of a public nature in Scotland," 8 and 9 Vict. c. 17, (8 May 1845). It is shortly entitled, "The Companies' Clauses Consolidation (Scotland) Act, 1845."

SECT. XIV.—VOLUNTARY ASSOCIATIONS—JOINT STOCK  
COMPANIES—BANKS—FRIENDLY SOCIETIES.

By the act 6 Geo. I. c. 18, (*the Bubble Act*, 1719), § 18, *et seq.*, the acting, or presuming to act, as a corporate body, the raising transferable stock, the transferring, or assigning any such stock, without a charter or act of Parliament, was deemed a public nuisance, and a severe punishment was appointed to be inflicted on all persons engaged in such proceedings; but, by the statute 6 Geo. IV. c. 91, (5 July 1825), the above statute is repealed, and these matters are "to be adjudged and dealt with according to the common law."

Now, the general rule of the common law, both of this country (Ersk. and Bankt. *supra* last Section) and of England, is, that a voluntary association cannot be formed, which can sue or be sued by the name by which it is designated, for

it has not the artificial person, the *persona standi*, which a charter or act of Parliament confers. This was found long ago, *Mason Lodge of Lanark v. Hamilton, &c.*, 11 June 1730, M. 14554, and has always been considered as settled since. It is equally incompetent for such associations to sue or be sued by their office-bearers; and, accordingly, an action in the name of the box-master of a society of tradesmen was dismissed, *Crawford v. Mitchell*, 13 June 1761, M. 1958. In an application for suspension and interdict at the instance of the office-bearers of a lodge of freemasons, the following interlocutor was pronounced:—"In respect the suspenders insist in their character of office-bearers of a self-constituted society, which is not entitled to the privileges of an incorporation, repel the reasons of suspension, refuse the interdict, and decern;" *Lawson, &c. (Office-Bearers of Canongate Kilwinning Lodge) v. Gordon, &c.*, 7 July 1810, F. C. These decisions are confirmed by several other cases, *Wilson, &c. v. Kippen, &c.*, 7 June 1823, ii. S. 378, (N. E. 335); *Thomson v. Lindsay, &c.*, 30 Nov. 1825, iv. S. 239, (N. E. 243); *Way v. Kay, &c.*, 5 June 1828, vi. S. 914; see also *Trotter and Grant v. Dore*, 3 Dec. 1833, xii. S. 161; *Craig v. Fleming and Wilkie*, 9 Feb. 1838, xvi. S. 488. Any attempt by such voluntary associations, clubs, or fraternities, to enforce their rules, or levy the subscriptions of the members, by an action in the names of the whole other members, might be of doubtful legality, as it is one of the most valuable privileges of incorporations to make rules and regulations; *Ersk. and Bank., supra*; i. Blackst. 468 and 475, (Ed. 1844), Lord Alloway's remarks in *Sea Assurance Co. of Scotland v. Gavin, &c.*, 17 Feb. 1827, v. S. 375, (N. E. 348); *Aff. on merits*, 18 Feb. 1830, iv. W. and S. 17. Besides, some of these associations have been considered illegal, and suppressed by the court, *Pror. Fiscal v. Wool-combers in Aberdeen*, 15 Dec. 1762, M. 1961; and an illegal society

cannot sue in any form. In various cases, however, it has been held, that where parties contract with the office-bearers of such a voluntary association, the title of the latter to sue or be sued, cannot be called in question, *Leslie v. Sproat*, 24 Jan. 1829, vii. S. 312; *Gemmels v. Barclay, &c.*, 19 Nov. 1830, ix. S. 33; *Ross v. Young and Lauder*, 14 Jan. 1831, ix. S. 275; *Ramsay, &c. v. Smail, &c.*, 7 July 1840, ii. D. 1336; but the regulations by which these office-bearers are constituted, their title to sue, and the *species facti* of their opponent's connection with them, ought to be distinctly set forth; *Gillies and Miller v. Hunter*, 11 Jan. 1831, ix. S. 257; see also *Thomson v. Shanks, &c.*, 28 Feb. 1840, ii. D. 699; see *infra*. When a society, however, is tolerated by law, as Seceder congregations, 10 Anne, c. 7, (1711), § 5,<sup>1</sup> actions have been sustained by one body of the members against other members, relative to the property of the congregation, as the place of worship. The objection to the title to pursue was, no doubt, formerly sustained; *Wilson v. Brysson, &c.*, 30 June 1752, v. Sup. 798; and *Pollock, &c. v. Maxwell, &c.*, 8 July 1752, Elch. *Title to Pursue*, Nos. 1 and 2; but, in a later case, *Wilson, &c. v. Jobson*, 13 Dec. 1771, M. 14555, Hailes, 462, an action by the pursuers, "for themselves, and as commissioners constituted by the Associate Congregation of Dundee," against another member, to declare a trust, and concluding that he should grant to the pursuers, for themselves, and in name of the other members of the congregation, a valid disposition of the house of worship, was allowed to proceed. The pursuers were a majority of the congregation at the date of the trust, and the defender admitted he held the property in trust for

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<sup>1</sup> This portion of the statute is generally quoted as the foundation of the broad religious freedom now happily existing, although its object appears to have been more restricted.

the congregation. The Lord Ordinary, therefore, ordered him to denude, and the court, after ordering the designation assumed by the pursuers, as "commissioners for the Associate Congregation," to be struck out, adhered. Many similar actions have been sustained; *Allan v. Macrae*, 25 May 1791, M. 14583; and *Davidson, &c. v. Aikman, &c.*, 27 June 1805, M. 14584, which was appealed and remitted, 16 June 1813, i. Dow, 1; but the court adhered, 18 Feb. 1815, Aff. 21 July 1820, ii. Bligh, 529; *Dun, &c. v. Brunton*, 13 May 1801, M. Apx. Society, No. 3; *Bulloch, &c. v. Smith, &c.*, 31 Jan. 1809, F.C.; *M'Intyre, &c. v. Macree, &c.*, 24 Feb. 1809, F. C.; *Smith, &c. v. Galbraith, &c.*, 6 June 1839, xiv. F. 979, D. (under date of 21 Feb. 1843), v. 665; see *Craig v. Fleming*, supra. Such actions among the members, regarding the right to the joint property, are evidently very different from attempting to act as incorporations, and to sue in that form.

Mercantile joint stock companies or associations, distinguishable from ordinary copartnerships for trade, (next Section), by their shares being transferable, and their management vested in boards of directors, made known to the public by advertisement or otherwise, may also sue and be sued, but not by any *descriptive* name they may adopt, by which they do not contract obligations, as *The Culcreuch Cotton Co.*, *The Clyde Shipping Co.*, or such like; *Culcreuch Cotton Co. v. Mathie*, 27 Nov. 1822, ii. S 47, (N. E. 41); *Kerr v. Clyde Shipping Co. and Murray*, 8 June 1839, i. D. 901. But "there seems to be no bar to prevent a joint stock company from authorizing their directors, or any individual, to sign and contract, so as to bind them, or to sue and defend in their name; and when obligations are undertaken to a joint stock company in name of an officer, as acting for the society, action seems to be competent in the name of that officer," ii. Bell's Com. 629; *Sea Insurance Co.*,

*&c. v. Gavin, &c.*, 17 Feb. 1827, v. S. 375. (N. E. 348); *Fisher and Hepburn v. Syme and Stewart*, 7 Dec. 1827, vi. S. 216; *Downe, Bell, and Mitchell v. Pitcairn, &c.*, 24 June 1829, W. and S. iii. 472; *Magistrates of Perth v. Stewart*, 27 May 1830, viii. S. 819; *Gillies and Miller v. Hunter*, 11 Jan. 1831, ix. S. 257; (see *Creighton v. Rankin*, *infra* p. 195). Where a person has left legacies to charitable or religious societies, and has declared the receipt of the treasurer or secretary a sufficient discharge, a claim in name of the society, (though unincorporated), and of its officers, has been sustained; *Sommervail, &c. v. Edinburgh Bible Society, &c.*, 22 Jan. 1830, viii. S. 370; see also *The General Assembly of the General Baptist Churches, &c. v. Taylor*, 17 June 1841, iii. D. 1030.

In actions against a joint stock company, it has been found, that it is not enough to call merely two or three of the general body of the partners, *Stevenson and Co. v. Arran Fishing Co.*, 14 Nov. 1757, M. 14560, v. Sup. 340; but it seems to have been thought sufficient to call the directors, *ibid.* In the *Sea Assurance Co. v. Gavin, &c.*, *supra*, an action against a joint stock company, the manager, and the three directors who subscribed the policy founded on, was sustained. The conclusions of the action were directed against the manager, as manager and partner of the company, and against the directors, without specifying whether as individuals or directors; but the narrative set them forth as directors, and the summons was executed against them, not personally, or at their dwelling-places, but by leaving a copy for them with a clerk in the office of the company; see next Section. Where the company, however, is dissolved, the power of the officers being at an end, the whole partners must be called, especially if the claim is not constituted, or the ground of action established; *Scott v. Napier*, 23 Feb. 1827, v. S. 414, (N. E. 393); and *Geddes v. Hop-*

*kirk*, 2 June 1827, v. S. 747, (N. E. 697); see also *May, &c. v. Matthews and Forbes*, 24 Jan. 1833, xi. S. 305, Section viii. *supra* p. 166; Section xv. *infra*.

Joint stock banking companies were generally in the practice of suing in the name of their cashier, or other principal officer. In the case of the *Commercial Bank v Pollock*, spring 1825, Lord Gifford objected, that the bank, having no charter, was not entitled to sue or be sued, by its descriptive name along with certain of the partners; and his lordship, it has been stated, after consulting with Lord Chancellor Eldon, declared the objection was fatal, Note, vi. S. 218. No judgment, however, was written out; and the case having been again heard in summer 1828, the title to sue was sustained at common law; 28 July 1828, iii. W. and S. 365. See also *Cabbell v. Brock*, 13 May 1828, iii. W. and S. 75. The title of a cashier insisting in name of a banking company, had formerly been sustained, *Low v. Bell*, 12 June 1827, ii. W. and S. 579; *Low v. Duncan*, *ibid.* 583; and this point was held as settled, *Cheyne and Mackersy v. Little, &c.*, 2 Dec. 1828, vii. S. 110; *Clarke and Highgate v. Wilson*, 7 July 1830, viii. S. 1025; *Drummond v. Holliday*, 18 Jan. 1831, ix. S. 284.

In consequence of the doubts entertained in the House of Lords, a temporary act (6 Geo. IV. c. 131, 6 July 1825), was passed, enabling joint stock companies for banking and other commercial purposes, to sue in the name of the firm, or in that of the manager, cashier, or principal officer. Afterwards an act, 7 Geo. IV. c. 67, (26 May 1826), limited to joint stock banking companies, passed the legislature, providing, that such banks may sue and be sued, in the name of the manager, cashier, or other principal officer of such society; but under condition of an annual entry at the Stamp Office in Edinburgh, of the name of the society or company, and of every partner, and of the name and abode of the manager, or other officer, in whose name



the society is to sue and be sued, &c. It has not been determined whether this act takes away the title at common law to sue in the names of the officers; *Cheyne and Mackersy*, supra; but this question is not likely now to occur, as every joint stock banking company is obliged to make the above entry, under a penalty of £500 for each week it carries on business without doing so. Such banks now generally sue in the name of their manager, cashier, or principal officer, libelling on his title both at common law and under the statute.

Although, however, it would appear that a trading association may competently sue in the name of its directors, or other authorized officers, it has not been unusual, in our later practice, to raise actions in the names of the company and whole partners. Before raising such an action, the regular mode is, to call a meeting of the partners, and get their authority; and, in such a case, it is no objection that the minority do not concur. But an action may also competently be raised, in the name of the association and individual partners, without any meeting; and the objection, that, of a numerous company, a few of the partners are not named, or disclaim the action, will not be listened to; *Shotts Iron Co. &c. v. Hopkirk*, 19 Jan. 1828, vi. S. 399.

By statute 1 Vict. c. 73, (17 July 1837), applicable to the whole empire, Her Majesty is empowered, on certain conditions, to grant by letters patent to joint stock companies, any privilege or privileges which may at common law be conferred on incorporations. By § 3, such associations may be authorized to sue or be sued in the name of an officer to be appointed and registered, with whom any member of such association may be conjoined as defender by the plaintiff in the suit, for the purpose of discovery, or in case of fraud.<sup>1</sup>

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<sup>1</sup> See also the statute 7 and 8 Vict. c. 110, (5 Sept. 1844), "An Act for

In actions against commissioners of police, magistrates of burghs, &c., as representing the community, &c. it is the parties who are in office at the date of executing the actions, who ought to be sued,—not those who were in office when the cause of action arose; see *Coldstream and Scales v. Threshie*, 18 Feb. 1832, x. S. 356.

A partner of a company may sue for damages on the ground of slander directed against the company, but he must libel for reparation of the injury which he, as an individual, has sustained; *Williams and Mandy. v. Allan and Watson*, 20 Feb. 1841, iii. D. 600; see *supra* p. 177.

Another exception to the rule, that voluntary associations have no *persona standi* has been made by statute in the case of "*Friendly Societies*." The 33 Geo. III. c. 54, (21 June 1793), authorizes any number of persons to establish societies of good fellowship, for raising by contributions a stock for the mutual relief of the members in old age, sickness, or infirmity, or for the relief of the widows and children of deceased members; and to make regulations and impose fines, to secure their observance. But such societies are not entitled to the benefit of the act, unless the regulations have been confirmed by the justices of the peace, at the quarter sessions. The effects of the societies are vested in the treasurer, or trustees, for the time being, who are empowered to sue and defend actions, regarding the same, (§§ 8 and 11); see also 43 Geo. III. c. 111, (27 July 1803), and 49 Geo. III. c. 125, (20 June 1809). The statute 35 Geo. III. c. 111, (26 June 1795), extends the benefit of the 33 Geo. III. to institutions, for the purpose of relieving "the widows, orphans, and families of the clergy, and others, in distressed circum-

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the Registration, Incorporation, and Regulation of Joint Stock Companies," which has a limited application to Scotland. It is amended by 10 and 11 Vict. c. 88, (22 July 1847).

stances." An action against the office-bearers of a friendly society was dismissed, because the regulations had not been approved of by the justices; *Way v. Kay, &c.*, 5 June 1828, vi. S. 914. The later Friendly Society acts are 10 Geo. IV. c. 56, (19 June 1829), repealing the previous acts; 4 and 5 Wm. IV. c. 40, (20 July 1834); 3 and 4 Vict. c. 73, (7 Aug. 1840); and 9 and 10 Vict. c. 27, (3 July 1846).

#### SECT. XV.—MERCANTILE COMPANIES.

The practice formerly, in actions by mercantile companies, was to set forth the names of the partners, as trading under a particular firm; Lord President Hope's speech in *Scott v. Napier*, 23 Feb. 1827, v. S. 414, (N. E. 393), (but see Bell's *Styles*, vi. 10). It was not, however, questioned till the doubts arose in the House of Peers in regard to banking companies, noticed in last section, that such a company, or a private banking company, might sue and be sued by the company firm, by which they sign their obligations, although it is not unusual to add the names of the partners to the company firm; Lord Justice-Clerk (Boyle's) remarks in *Sea Insurance Co. &c. v. Gavin, &c.*, 17 Feb. 1827, v. S. 375, (N. E. 348), *Thomson v. Liddell and Co.*, 2 July 1812, F. C. In one case, however, it was held, that the names of the partners must be mentioned, as well as the company firm; *Aitchison and Co. v. Burnside's Trs.*, 4 Feb. 1832, x. S. 296. But the point was reconsidered in *Forsyth v. John Hare and Co.*, 18 Nov. 1834, xiii. S. 42, when it was unanimously determined by the whole judges, that a mercantile company, carrying on business under a proper firm, by which they grant obligations, may be called in an action and cited by the firm, without the name of any individual partner. This decision was confirmed in *Wilson, &c. v. Ewing, &c.*, 20 Jan. 1836, xiv. S. 262, where it was held that a mercantile company may give a charge on a bond in name of the social firm by

which they grant obligations, though the name of no individual partner be specified as a charger. See also *Thomson, Bonar, and Co. and Mandy. v. Johnstone*, 30 Nov. 1836, xv. S. 173; *Craig v. Brock and Ferguson*, 23 Nov. 1841, iv. D. 54. But such a company cannot sue by a mere *descriptive*, not a *personal* designation, *Culcreuch Cotton Co. v. Mathie*, 27 Nov. 1822, ii. S. 47, (N. E. 41). And the manager of such a company cannot sue in its name and for its behoof; *Robertson v. Anderson*, 4 June 1841, iii. D. 986. So where a company, having a descriptive name, raised action in name of the company, and of a party *nominatim* "agent therefor, and one of the partners thereof," it was held that the instance was bad, but the court intimated an opinion that a mercantile company not incorporated may sue and be sued under its descriptive firm along with three individual partners named; *London, &c. Shipping Co. v. M'Corkle*, 19 June 1841, iii. D. 1045. In *Fleming v. Ballantyne*, 13 Dec. 1842, v. D. 305, diligence at the instance of J. B., "in name and for behoof of, and as authorized by the Greenock Distillery Co.," was held incompetent. There appears little difference between such a designation, and the firm of a company, in which all the partners named in the firm are dead; but this distinction is well established; opinions in *Sea Insur. Co. &c. v. Gavin, &c.*; *Forsyth v. Hare and Co.* *supra*, &c. If the case of *Thomson*, *supra*, however, be well decided, the reason given for the distinction, that it was not easy to see how diligence could be done against a company, called merely by a designation, is hardly sufficient; as a horning against a company was held to authorize a messenger to charge the individual partners, though not named in the horning. The decision in this case was lately confirmed, the court holding that on a warrant to charge a company, any of its individual partners may be charged; and that the insertion of the name of one partner in the warrant does not

exempt any other partner of the company from being charged thereon; *Knox v. Martin*, 12 Nov. 1847, x. D. 50; and the same objection might be stated to a summons against a company by its mercantile firm, especially if all the partners whose names appeared in that firm were dead, as often happens. On a principle similar to that in the case of the *Culcreuch Cotton Co*, it was decided that "commissioners of police," under a local statute, could not pursue under that designation, without the names of the individuals, as they were not incorporated; *Tannoch v. Reed, &c.* 14 May 1829, vii. S. 605.

A mercantile company, however, cannot, by its firm, prosecute criminally, even before the Court of Session, for fraudulent bankruptcy, "inasmuch as the artificial person, or rather description, is not susceptible of the sense of injury; and the pannel so called on, does not know who the individual accusers are;" ii. Hume, Com. 119, 116, note; *Aitken, &c. v. Rennie*, 11 Dec. 1810, F. C.; *Renfrewshire Banking Co. v. M'Kellar*, 18 May 1816, ii. Bell, Com. 380, n. Neither can a penal action, containing conclusions in *modum pænæ*, be competently pursued against a company. Any claim made, therefore, in respect of *delict* or *quasi delict*, must be directed against the individual partners, and not against the social firm; for a social firm cannot be an object of punishment; *Miles v. Finlay and Co., &c.*, 16 Nov. 1830, ix. S. 18. *Infra* P. ii. 2. 4.

In actions against a mercantile company, it is sufficient to cite the company at its place of business; but if the company be bankrupt or dissolved, the whole partners must be cited, *Dewar v. Munnoch*, 23 Feb. 1831, ix. S. 487, and cases there; at least this must be done where the debt has not been constituted against the company; *Geddes v. Hopkirk*, 2 June 1827, v. S. 747. (N. E. 697); see *M' Tavis v. Lady Salton*, 3 Feb. 1821, F. C.

Where a summons libelled on a debt as due by a party as "agent or manager" of a Distillery Company, it was held that the partners of the company, the proprietors of the distillery, ought to have been cited; *M'Millan and M'Kellar v. M'Culloch*, 28 Jan. 1842, iv. D. 492. If an individual is sole partner of a concern which he carries on under a company firm, he appears to be entitled to sue for debts due the firm in his individual name; *Mills v. Hamilton*, 19 Feb. 1830, viii. S. 570. Although each partner of a company is liable for its debts, he cannot be sued for payment till they shall be constituted against the company, *ibid.* Where some of the partners only have been called, without calling the company, the action has been dismissed; *Reid and MacCall v. Douglasses*, 11 June 1814, F. C. A partnership subsists after dissolution, for the purpose of winding up the concern, Bell, Com. ii. 637, and authorities there cited; *Cheyne and Mackersy v. Walker*, 26 Nov. 1828, vii. S. 60.

#### SECT. XVI.—JUDICIAL TRUSTEE.

In an action by a trustee on a sequestrated estate against the creditors, for reimbursement of the expenses he had incurred, in suits carried on for behoof of the estate, it was held that he must call, as parties, all the creditors who had ranked; *Johnstone v. Arnotts*, 23 Jan. 1830, viii. S. 383. By § 29 of the last bankrupt act, 2 and 3 Vict. c. 41, (17 Aug. 1839), the liability of creditors for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate, is much restricted. It was decided that such a trustee, though "vested *vi juris* with the powers of an owner, as far as concerns the civil interest, the recovery and distribution of the funds of the bankrupt," had no right to insist in a criminal prosecution in that character, *Belch.*, 3 Jan. 1806, Hume Com. ii. 119, and that he could not even prosecute the bankrupt for fraudulent bankruptcy before the Court of

Session, *Aitken, &c. v. Rennie*, 11 Dec. 1810, *ibid.* and F. C. By the 7 and 8 Geo. IV. c. 20, (28 May 1827), however, fraudulent bankruptcy may be prosecuted before the Court of Justiciary, or Circuit Courts; and the trustee, or any creditor duly ranked, with concurrence of the Lord Advocate, may prosecute such offence in those courts, without prejudice to the title of the public prosecutor to insist in all such prosecutions. If any person shall be guilty of wilful falsehood in sequestrations, he may be prosecuted either at the instance of Her Majesty's Advocate, or at the instance of the trustee, with the concurrence of Her Majesty's Advocate, and authorized by a majority in value of the creditors, 2 and 3 Vict. (*supra*) § 137. It may be here noticed, that though it was long ago fixed, *Syme v. Steel*, 10 Aug. 1765, M. 14,979, and *Aitken, &c. v. Rennie*, *supra*, that fraudulent bankruptcy could be prosecuted in the Court of Session in the form of a Petition and Complaint only; in the last edition of the Juridical Styles, a form of a *Summons* of fraudulent bankruptcy is given.

#### SECT. XVII.—JOINT AND PART OWNERS.

Where a property is held by two or more proprietors in common, all the proprietors must concur in raising actions, to remove tenants, or for other purposes. This was found where there were only two proprietors; and the action was pursued by the owner of  $\frac{1}{2}$  of the property; *Bruce v. Hunter and Leisk*, 16 Nov. 1808, F. C. The same rule has been applied in an action by one part owner of a ship, for a debt due to the whole, where the concurrence of all could easily be obtained; *Scotland v. Walkinshaw*, 18 Nov. 1830, ix. S. 25. In an action by a party designing himself "manager, agent, or ships-husband" of a steam-vessel, against one of two joint owners for repayment of his proportion of alleged disbursements, made by the pursuer on account

of the vessel, the Lord Ordinary (Ivory) ordered the other owner to be brought into the field, before allowing the case to proceed, *Moffat v. Smith*, Mar. 1847, (not reported). The owner of a vessel, and two other parties having bound themselves conjunctly and severally in a bond of caution, on loosing an arrestment on the vessel, and a forthcoming having been carried on against these parties, without calling the owner, the proceedings were held inept, *M'Donald and Galloway v. Farlane*, 30 May 1834, xii. S. 654. When any one of a body of co-obligants is sued, he may insist that the whole be brought into the field before the action can proceed against him.—Tait's MS. "Accumulation of Actions."

SECT. XVIII.—EXECUTORS, ASSIGNEES, ROAD TRUSTEES,  
SPECIAL ASSIGNEES, &c.

"Where two or more are conjoined in the office of executor, all of them are understood to hold the office *pro indiviso*;" "and therefore all must concur in suing the debtors of the deceased," Ersk. iii. 9. 40; *Inglis v. Mirrie*, 7 Nov. 1738, M. 14,690 and 16,115; but when three were named, and two only confirmed, the third being abroad, these two were found entitled to pursue; *Grant and Gregory v. Campbell's Reprs.*, 11 July 1764. M. 14,690. An objection to the title of one of two executors nominate, suing for his share of the funds of the deceased, (which the defender was alleged to have intromitted with), that the other did not sue with him, held not well founded, *M'Target v. Monteith* or *M'Target*, 12 May 1829, vii. S. 591. Six co-executors raised an action of count and reckoning, two of them became bankrupt, and executed a disposition *omnium bonorum* to a trustee for their creditors; the trustee declined to appear in the action, which was therefore dismissed so far as they were concerned; held by the Lord Ordinary, after advising with the court, that the remaining four co-executors had a title to pursue, without the



concurrence of the other two, *Rogerson, &c. v. Barker, &c.* 9 Mar. 1833, xi. S. 563. A. B. and C. were executors and residuary legatees of a party deceased; A. raised action against B. for payment of his share of a debt alleged to be due by B. to the deceased, it being stated in the libel that the other executor C. refused to concur in the action, which was not denied; held that the instance was good, *Torrance v. Bryson*, 24 Nov. 1841, iv. D. 71. Mr. Erskine (iii. 9. 39,) states, that though an executor cannot, in the general case, sue the debtors of the deceased until confirmation, which gives him the *jus exigendi*, yet if unwilling to confirm doubtful debts, he may, before confirmation, sue for payment, on a licence from the commissaries. An executor, though merely decessed has a title to pursue, *Munro v. Tod*, 22 May 1829, vii. S. 648; and a decree dative in favour of an executor creditor is also a good title; *Maitland v. Cockerell and Trail*, 23 Nov. 1827, vi. S. 109. A confirmation as executor creditor, without production of the grounds of debt, is a sufficient title to pursue, *Dickson and Clark v. Barbour and Mitchell*, 27 May 1828, vi. S. 856. A general disponent of one deceased may also sue, as the deed is held equivalent to a license, *Halyburton v. L. Roxburgh*, 25 June 1663, M. 16,090; and one having a general assignation to an account-book, *Douglas v. Cochran*, 13 July 1715, M. 16,109. English letters of administration are also a sufficient title, *Beaton v. Macmorran, &c.* 12 July 1664, ii. Sup. 342; *Fraser, &c. v. Johnstone's Trs.*, 11 July 1821, i. S. 122, (N. E. 120); Ersk. iii. 9. 38, 39, (Ivory's Ed.) and references, where the effect of the statute 4 Geo. IV. c. 98, (19 July 1823), in declaring that intestate succession shall vest in the next of kin by survivance, will be found noticed. But in all these cases, the pursuer must confirm before extract, as must a pupil pursuing, as next of kin, by his administrator in law, *Reid v. Turner*, 23 June 1830, viii. S. 960; see also *Fyffe*,

*&c. v. Fergusson*, 6 July 1842, iv. D. 1482; and if an executor proceed to adjudge without confirming, the adjudication will be null, though the decree of constitution be obtained *in foro*; *Arbuthnot v. Cockburn*, 27 Nov. 1789, M. 14,383. Where a bond of corroboration has, however, been granted to the executor or assignee, there is no need of confirmation; *Watson v. Marshall, &c.* 19 June 1782, M. 7009. *Infra* P. iv. 9. 8. If an individual is sole partner of a concern, which he carries on under a company firm, he appears to be entitled to sue for debts due to the company firm, in his individual name, and his executrix is, of course, entitled to insist in actions for payment of them, *Mills v. Hamilton*, 19 Feb. 1830, viii. S. 570. The pursuer of an action of damages having died while it was in dependence, his widow expedite confirmation to him as executrix *qua* relict, and gave up the claim of damages as being part of his estate, but died before the testament was executed, the claim being then still undetermined; held that her confirmation had effectually taken the claim for damages out of her husband's estate, and vested it in her person, so that one of her creditors who had been decerned to her executor *qua* creditor, was entitled to take up the claim and sist himself in the action as pursuer, *Mein v. McCall*, 7 June 1844, vi. D. 1112. Where executors are named, the party having the beneficial right has no title to sue, *Peock v. Glasgow*, 4 Mar. 1824, ii. S. 769, (N. E. 639).

An assignee is of course in the same situation as his cedent, and vested with all title and interest to sue or be sued which the latter possessed. Some cases of a more peculiar description may be here noticed. An assignation of a decree in a suspension finding the letters orderly proceeded carries right to the bond of caution lodged in the suspension, and the assignee may, after the death of the cedent, sue without confirmation, *Lyell v. Christie, &c.* 11 Mar. 1823, ii. S. 288, (N. E.

253). An assignation of a claim in security of a debt due to the assignee, and to the extent of the debt, held (after notice to the assignee, who did not object), not to preclude the cedent from pursuing for recovery of the claim so assigned; *Robertson and Co. v. Exley, Dimsdale and Co.*, 24 Nov. 1832, xi. S. 91. On an objection to the instance of a pursuer, that he is by assignation divested, it is competent for his assignee to sist himself, without the consent of the defenders, which is in general necessary before a new pursuer can be sisted, *Fraser v. Duguid*, 9 June 1838, xvi. S. 1130. In *Glen v. Glen*, 17 Nov. 1826, v. S. 11, (N. E. 10), it was held, that to entitle a party, as assignee of the creditors of a sequestrated bankrupt, to insist in an action of reduction of a conveyance, or transfer of money by the bankrupt, he must have an assignation to that special effect. See also *Mackenzie v. Chisholm*, 29 June 1824, iii. S. 190, (N. E. 129). An assignation to a subject will sometimes be held to include a conveyance of accessory rights. Thus, an assignation to a lease was held to carry right to a depending action of removing from the subjects comprehended under it, and also to a claim for violent profits for subsequent retention of possession, and to a bond of caution for the same lodged in the removing, *Barbour v. Bell, &c.*, 25 Jan. 1831, ix. S. 334; *Lyell*, *supra*.

A simple indorsation by a party in right of an open account in favour of another in such terms as, "Pay the within account to A. B.," although unstamped, operates as an effectual conveyance, entitling A. B. to sue; *Laurie v. Ogilvie*, 6 Feb. 1810, F. C. This form is in daily use, where there are various claims against an individual, vested in different parties. These are indorsed to one party, who, as pursuer, insists for the benefit of the whole. But none of these claims must be under £25, *supra*, p. 7; and such orders or mandates, if given for value, will be null under the stamp laws, *Sutherland v. Munro*, 13 Nov. 1847, x. D. 87.

It is to be observed, that in the House of Lords, grave doubts have been expressed how far a party can enable another to maintain a suit in his own name, while the party giving the authority retains the property, *Creighton v. Rankin*, 26 May 1840, i. Rob. 100.

In virtue of the general road act, 1 and 2 Will. IV. c. 43, (15 Oct. 1831), § 16, the trustees of every turnpike road may pursue and be pursued in name of their clerk or treasurer for the time being; but this regulation was held not to apply to the district clerks, but only to the clerk under the general trust; *Williamson, &c. v. Goldie, &c.*, 2 Mar. 1832, x. S. 413; but in *Revey and Bell v. Murdoch*, 11 Mar. 1841, iii. D. 888, (where a former case of *Creighton v. Rankin*, as decided in the House of Lords, 26 May 1840, i. Rob. 100), was referred to, it was decided that the district clerk is the proper party to sue and be sued.

The act 1690, c. 26, (c. 56, Th. Ed. ix. 198), declares, "where special assignments and dispositions are lawfully made by the defunct, though neither intimated nor made publick in his lifetime, they shall be yet good and valid rights and titles, to possess, bruike, enjoy, pursue, or defend: Albeit the soumes of money or goods therein contained be not confirmed;" and special legacies are held to fall under this statute; *Gordon v. Campbell*, Jan. 1729, M. 14384.

#### SECT. XIX.—LORD ADVOCATE.

"The King's Advocate cannot prosecute any action at the instance of the King, tending to challenge the right of any of His Majesty's subjects, without a special mandate to that effect," *H. M. Advocate v. Moncreiff*, 2 Feb. 1693, M. 7905 and 3461; yet "he may insist in a declarator of the boundaries of the king's forests, because this is only protecting the rights of the crown;" *E. of Breadalbane and H. M.*

*Advocate v. Menzies*, 25 July 1735, M. 7905; and he must be made a party to the action where the boundaries of forests are in dispute; same parties, 29 Jan. 1835, *Craigie and Stewart*, 146.

The Lord Advocate has no title, without a special warrant under the sign-manual, to institute an action regarding the patrimonial rights of the crown, and such action will not be validated by a royal warrant of ratification subsequently obtained; *King's Advocate v. L. Dunglas and Cunningham*, 24 Dec. 1836, xv. S. 314; in House of Peers on other points, 28 Feb. 1842, Bell, App. 93.

When a person leaves funds for charitable purposes, and appoints trustees to attend to their management, the question has been raised, Who is entitled to see that the testator's intentions are carried into effect, and the funds really applied in the way he intended? Now, although it is an obvious objection to the executors of the testator, that they have no interest (at least pecuniary) in the matter, yet their title to pursue an action against the trustees has been sustained, *Campbell v. McIntyres*, 12 June 1824, iii. S. 126, (N. E. 85), and this decision was approved of both by the court and the House of Lords; *Hill, &c. v. Burns, &c.*, 14 April 1826, ii. W. and S. App. 80, 83, and 91. When the fund left is heritable, it would appear the heir-at-law is the proper pursuer. Where the executors and heir will not interfere, perhaps the Lord Advocate might have a sufficient title to enforce the fulfilment of the testator's intentions; *Ibid.* and *Crichton v. Grierson, &c.*, 25 July 1828, iii. W. and S. 329.

#### SECT. XX.—LORD ADVOCATE'S CONCURRENCE WHEN NECESSARY.

In criminal proceedings before the Court of Session, which are now very rare, (*infra* P. v. 24), the concurrence of the Lord Advocate is necessary, as in a petition and complaint for

punishment of fraudulent bankruptcy; *Syme v. Steel*, 10 Aug. 1765, M. 14979; *Darby v. Love*, 10 Feb. 1796, M. 7907. Where the offence complained of, however, is not properly a crime, but rather an irregularity, as in Complaints against practitioners or messengers for malversation, and where the conclusions of the complaint are merely for damages and expenses, the Lord Advocate's concurrence is not necessary. Thus, a complaint against a writer for filling up a blank messenger's execution, without any proper warrant from the messenger, was sustained without concurrence, *Wilson*, 12 July 1740, A. S. 358; and even a charge of subornation of perjury and vitiation of parish records, where the complaint was restricted to damages and expenses; *Baillie, &c. v. Waddell, &c.*, 1 Mar. 1822, i. S. 368, (N. E. 345). A complaint upon a penal statute for issuing notes, and concluding for penalties of no less than £18,000, was sustained without concurrence; *Miles v. Finlay and Co., &c.*, 16 Nov. 1830, ix. S. 18. In another case, *M'Farlanes v. A. B.*, 6 Mar. 1827, v. S. 537, (N. E. 504), a clerk was suspended from his office on the application of a party, without concurrence of the Lord Advocate; on appeal, the suspension was recalled, and the party ordered to pay the costs of the appeal, in lieu of the suspension, 8 April 1830, iv. W. and S. 123. Complaints on the former election statutes for forfeiture of the penalties to the complainer, were also competent at the instance of the private party alone; but whether he could insist for imprisonment or deprivation of office was much doubted; *Syme v. Murray*, 19 Jan. 1810, F. C.; *Fraser v. Gordon*, 19 Nov. 1768, M. 8777; *Home Campbell v. Sinclair*, M. 8884; and it seemed latterly to be settled in the negative, *M'Intosh of Raigmore v. Mackenzie*, 9 Mar. 1819, i. Bligh, 272; see also *M'Aulay v. M'Kenzie*, 23 Nov. 1830, ix. S. 48. In *Harvey v. Swan*, 16 Dec. 1837, xvi. S. 249, this last

case was referred to, and confirmed. A complaint for censure or fine of a magistrate or judge, seems in a similar situation; *Anderson v. Spence*, 27 May 1830, viii. S. 820. In *D. of Northumberland v. Harris, &c.*, 23 Feb. 1832, x. S. 366, a petition and complaint, containing conclusions for imprisonment, &c., was held incompetent, without concurrence. The same decision was given where a petition was presented for breach of interdict, concluding to have the respondents punished for the vindication of the authority of the court, and for the security of the petitioners and the public in general, and reserving all claims of damage competent to the petitioners, *Usher and Cunningham v. Magistrates of Edinburgh, &c.*, 7 Mar. 1839, i. D. 639. See *Watson and H. M. Advocate v. Williamson*, 20 Feb. 1841, iii. D. 603, where a petition and complaint, with concurrence of the Lord Advocate, against a country agent, insinuating that he had made use of a forged document, but not directly charging him with forgery or guilty knowledge, was dismissed as irrelevant; see also *H. M. Advocate v. Bruce*, 22 June 1837, xv. S. 1184. A petition and complaint against a town-clerk for violating the Act of Sederunt, 6 Mar. 1783, which bore to be with concurrence of Her Majesty's Advocate, was dismissed as incompetent, such concurrence not having been actually obtained; *Mackenzie v. Thomson*, 4 Mar. 1843, v. D. 771.

It had formerly been held, that a private party has no title to demand imprisonment, *Haig v. Buchanan*, 20 June 1823, ii. S. 412, (N. E. 368); or infliction of penalties, *Murray v. Thomson*, 15 Dec. 1824, iii. S. 401, (N. E. 282); yet, in an earlier case, *M'Lachlan v. Black*, 15 Dec. 1821, i. S. 217, (N. E. 206), a complaint against a messenger for malversation, concluding for restitution of bills illegally extorted, and for punishment, was sustained, at the instance of the private complainer alone; and the punishment of setting in

the pillory and transportation seems even to have been inflicted without the Lord Advocate's concurrence; *Young*, 14 July 1741, A. S. 366; but such a decision would not now be given.

When, in the course of a process, instances of perjury or prevarication occur, the court have often punished these crimes incidentally, as they are of the nature of a contempt of court; and the court is, besides, authorized to punish such crimes by the act 1555, c. 47, (c. 22, Th. Ed. ii. 497), *supra* P. i. 2. 12. In crimes of a more serious nature, as forgery or fraudulent bankruptcy, the court were in use to recommend to His Majesty's Advocate to inquire into the matter, and he, as he saw cause, instituted prosecutions, or gave his concurrence to prosecutions, brought in common form, *Darby v. Love*, 10 Feb. 1796, M. 7907. See A. S. Index, *voce* Forgery, &c. Fraudulent bankruptcy, like other crimes, may now be competently tried in the Court of Justiciary, 7 and 8 Geo. IV. c. 20, (28 May 1827). Criminal proceedings are now of very rare occurrence in the Court of Session, *supra* p. 21. The concurrence of the Lord Advocate is not necessary in a Petition and Complaint for the penalties of usury, *Walker, &c. v. Allan*, 30 June 1807, M. Apx. Usury, No. 1.

It was found, (*Sir W. Jardine v. De la Motte*, 15 June 1795, M. 7906), that the Public Prosecutor alone had the title to prosecute for an attempt to commit the crime of subornation of perjury, and that a private party, who might have been injured had the attempt succeeded, had no right to prosecute, even with a concurrence for the public interest; but the soundness of this decision has been much questioned; ii. Hume Com. 121.

Farther, his lordship's concurrence is held necessary, even in cases where the libel is only by fiction laid on criminal grounds, as in actions of reduction improbation, actions of ranking and sale, which contain conclusions of reduction im-



probation, *Colt v. Simpson*, 23 June 1610, M. 7897; actions of reprobator against witnesses, *Paterson v. Johnstone*, 9 Nov. 1676, M. 12,114; also in all cases where the Crown has an interest, as in declarators of bastardy, ultimis hæres, &c.

By § 40 of 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), it is declared that summonses in maritime and consistorial causes, instituted in the Court of Session, shall not require any concurrence for the public interest.

Whatever may be the rule in proper criminal proceedings, (ii. Hume Com. 126, 3d Ed.) it appears that the Lord Advocate cannot refuse his concurrence in civil processes, when required, for this is merely a matter of form, and which in no respect affects the interest of the Crown, A. S. 31 Jan. 1633, *M'Aulay v. M'Kenzie*, 23 Nov. 1830, ix. S. 48.

The clerk at the signet office has, in general, authority from his lordship to grant his concurrence to summonses, &c. The fee payable is £1. 4s. 6d.

#### SECT. XXI.—LIS ALIBI PENDENS.

It is a good defence that an action of the same nature is already in dependence, *Brown v. Gilfillans*, 8 July 1825, iv. S. 152, (N. E. 153); *Miller, &c. v. Brown, &c.*, 22 June 1827, v. S. 825, (N. E. 765); *M'Neil or Jolly v. Brown, &c.*, 7 Feb. 1828, vi. S. 497. Where the first action is in dependence in an inferior court, and the second has been raised in the Court of Session, the device has sometimes been resorted to of bringing an advocacy of the inferior court process, *ob contingentiam*, to obviate the defence, but without success, *Ibid.*; *Miller, &c. v. Brown, &c.*, supra; *Dunn or Mason v. Merry*, 22 May 1832, x. S. 555; *Aitchison v. E. of Mansfield*, 19 Feb. 1830, viii. S. 562; *Scott v. Fisher*, 26 Feb. 1830, viii. S. 604; *Duff or Greig v. Johnston, &c. (Hepburn's Trs.)*, 7 Mar. 1835, xiii. S. 635. After execution, an action is held to be begun, Ersk. iii. 6. 3, and therefore no other action

can be raised till it is discharged, *Stewart v. Macra*, 18 May 1831, S. Jur. iii. 429. The action must be in the Scottish courts, for it is not enough that the previous process is in dependence in England, or a foreign country, *May and Attorney v. Wharton*, 25 June 1799, M. 8293, and other cases under *lis alibi pendens*; *Mure v. Sharp, &c.*, 10 July 1811, F. C. *Ranken v. Stewarts*, 29 Feb. 1840, ii. D. 717; *Inverarity and Co. v. Gilmore or Moffat*, 7 Mar. 1840, ii. D. 813. The English courts appear to follow a similar rule; but if any oppressive proceedings are used in consequence, our courts will interfere. Thus, a London merchant having raised an action against his debtor in the Court of Session, and during its dependence, having arrested him in London, whither he had gone to join his regiment, the court, on a complaint, found the pursuer liable in damages, *Shaw v. Robertson*, 13 Dec. 1803, M. Apx. *lis alibi pendens*; *Hallam v. Gye and Co.*, 22 Dec. 1835, xiv. S. 199. Weight is sometimes given to the fact of similar legal proceedings being in dependence in England. A multiplepounding having been brought, pending a suit in Chancery between two parties, who were claimants, and whose rights depended on the result of the suit; the multiplepounding was superseded till the true state of their rights was ascertained, in said suit or otherwise, *Wilmot v. Wilson*, 6 Mar. 1841, iii. D. 815. So where actions were pending in England, suits in Scotland at the instance of the plaintiffs, were only sustained to the effect of allowing diligence on the dependence to be used, *Munro v. Graham*, 4 July 1839, i. D. 1151; *Hawkins v. Wedderburn, &c.*, 9 Mar. 1842, iv. D. 924, and *Fordyce v. Bridges*, 2 June 1842, iv. D. 1334. *Supra* sect. xii.

To create the objection, the *lis pendens* must be regular, and the very same matter must be depending before another court; *Magistrates of Kilrenny v. Johnstone*, 26 Feb. 1828, vi. S. 624; *Butchard v. Walker and West*, 16 Dec. 1828, vii. S. 203; *Thomson or Paterson v. Thomson*, 18 Dec. 1829,

viii. S. 267. Thus it is no bar to an action of reduction and declarator against the creditors of a person deceased, to have it found that the pursuers do not represent their parents, that an action against them, on the ground of representation, is in dependence before the sheriff, *Arnotts v. Forsyth or Little*, 28 Feb. 1828, vi. S. 647; for the latter action was not calculated, like the former, to free the pursuers of all claims against them as representing their ancestors—nor to an action to constitute a debt, that a claim has already been made for it in a process of sequestration awarded against the defender, *Brown v. Paterson*, 12 May 1824, iii. S. 7, (N. E. 6)—nor that a party formerly in right of the claim has raised an action, which is still in dependence, *Nicolson v. Simpson*, 9 Dec. 1837, xvi. S. 211. Nor is it an objection to a creditor proceeding with summary diligence on a liquid ground of debt, that he has concluded for payment of the same debt in an ordinary action still in dependence, *Keltie v. Wilson*, 15 Dec. 1827, vi. S. 258; but see *Denovan v. Cairns*, 1 Feb. 1845, vii. D. 378; nor will an allegation that the subject matter of an action is involved in a pending submission be sustained, as a preliminary defence, to the effect of dismissing the action, *Macdonald, &c. v. Lord Macdonald*, 16 June 1829, vii. S. 765. During an action before the Court of Session, for the price of grain which the defender had refused to receive, and which was placed in a bonded warehouse in Stirlingshire, the court held that it was competent, in vacation, for the sheriff to grant warrant, on application, to sell the grain and consign the price in his court, reserving the pleas of parties on the merits, *Bannatyne v. Newendorff*, 22 Jan. 1841, iii. D. 429. In an old case, *Bisset and Edwards v. Groset*, 16 Jan. 1751, M. 7341, an action was raised in Exchequer on a bond due to the crown, to which defences were lodged, and a reduction was then raised in the Court of Session on the ground of fraud, and for other reasons. It was found that the re-

duction could not be proceeded with, as long as there was a dependence in the Court of Exchequer. But in another case, *The Lords of the Treasury and Her Majesty's Advocate v. Keith Stewart's Trs., &c.*, 12 Nov. 1799, M. Apx. Jurisdiction, No. 7, a decree of constitution, reserving objections, *contra executionem*, was given, notwithstanding the dependence of another action for the same debt in the Exchequer. In our older practice, this plea was held not to apply, where the cause had been deserted before liti-contestation; *Lord Belhaven v. Lord David Hay*, 7 Feb. 1706, v. Sup. 28, and iv. 639. Bankton, iv. 25. 14, seems to think the pursuer may obviate the defence by deserting his cause at any time, but cannot take advantage from any interlocutor pronounced therein; but this is contrary to Stair's opinion, iv. 40. 18. This matter is now regulated in the Court of Session by 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 10, which empowers the pursuer to abandon his cause, on payment of full expenses, and raise a new action; *infra* P. iii. 6, 2. It is a sufficient answer to the objection, where the previous action has proceeded no farther than a calling, to lodge a discharge of it in the new process; *Howie or M'Gregor v. M'Gregor*, 1 Feb. 1828, vi. S. 475; and *infra*, ii. 4. B. 2; but see *Sinclair v. Campbell*, 22 June 1832, (Outer-House), S. Jur. iv. 520.

SECT. XXII.—NUMBER OF PURSUERS AND DEFENDERS IN A SUMMONS.

Two or more persons, unconnected as partners, &c. cannot, in one action, conclude against the same or different persons, for payment of sums due to the pursuers separately, Tait's MS. "Accumulation of Actions;" *Flethers of Dumfries v. Rankine*, 10 Dec. 1816, F. C. If it is wished to save the expense of separate actions, the claims must be assigned to one individual, to recover for the general behoof. This is often done

in adjudications, and also in other actions; Ersk. iv. l. 65; *Gray, &c. v. Stuart, &c.*, 5 June 1741, M. 11,986; *supra* sect. xviii. p. 194. Parties may sue jointly, when they have been aggrieved by the same act, or have a joint interest in the matter libelled, *Gray, &c. supra*; *Jolly v. Brown, &c.*, 28 May 1828, vi. S. 872; *Revy and Bell v. Murdoch*, 11 Mar. 1841, iii. D. 888.

"In the same way, one person in the same summons cannot pursue for a debt due to himself, and also for a debt due to him as factor for another. This would be the same as to allow two pursuers to insist for different conclusions in the same libel. But one may, in the same summons, sue for one debt due to himself, and also for another debt due to him as trustee for another; for in this case, both debts are in his person,—only one of them in trust;" Tait's MS. *ubi supra*. It is not easy to follow this distinction.

Where an action has been improperly raised by several pursuers, it is not void; but may be held to be the summons of one of the pursuers; *Gray, &c. supra*; see *Bonthorn, &c. Petrs.*, 19 Dec. 1828, vii. S. 215. The pursuers will have "their choice in which of their names the action shall proceed. If they should differ as to the choice, most probably the right would be found to be in him who is first named in the summons;" *New Form of Process*, (2d Ed. 1799), 31. Where there are several defenders, again, liable under one ground of debt, whether conjunctly and severally, as in a bill, and generally in a bond, or each for his own share, as under a policy of insurance, any number may be pursued in one summons, and any of them may insist that all parties be brought into the field before the action proceed; Tait's MSS. *ubi supra*. Even when totally unconnected, it was the old practice to allow any number of debtors to be pursued in one summons; but as this was found to lead to confusion, the number is now restricted to six separate and unconnected

defenders; Reg. 1695, § 28, A. S. 209—Al. Abr. Apx. 129 ; see Acts of Society of W.S., 26 Nov. 1776, c. ii. § 3.

SECT. XXIII.—ACTION BY OR AGAINST AN HEIR.

Before suing, an heir must in general complete a title. But he may, on apparenecy, insist in an Exhibition *ad delib.*, a Reduction *ex capite lecti*, or a Sale of his ancestor's lands, More, 319.

In the case of ordinary petitory actions, and where the heir had neither made up any title nor behaved as heir, an action for his predecessor's debt could not, till lately, proceed against him until he had been charged by a general charge to enter heir; 1540, c. 106, (c. 24, Th. Ed. ii. 375). The *induciæ* of the first charge, whether the party were within Scotland or out of it, was forty days; and all subsequent charges, whether at the instance of the same or another creditor, might have proceeded upon twenty days' *induciæ*; 54 Geo. III. c. 137, (25 July 1814), § 8.

Charges to enter heir generally are now no longer competent; 10 and 11 Vict, c. 48, (25 June 1847), § 16. The statute declares "that it shall no longer be competent to use letters of general charge, or special charge, or general special charge, but, in an action of constitution of an ancestor's debt or obligation against his unentered heir, the citation on and execution of the summons, in such action, shall be held to imply and be equivalent to a general charge, the *induciæ* of which shall expire with the *induciæ* of such summons, and shall infer the like certification with such general charge; and it shall thereafter be competent to adopt, under such summons, the same procedure in all respects, and to pronounce the same decree, which would have been competent had such summons been preceded by letters of general charge duly executed against such heir, according to the

law and practice heretofore in use, which decree shall be a valid decree of constitution."<sup>1</sup>

The heir has a year to deliberate whether he will enter heir to his predecessor or not, called the *annus deliberandi*; and originally no proceedings could be instituted against him within the year. But it was latterly held competent to execute the charge within the year, and even to raise the summons, provided the day of compareance fell beyond it; Ersk. ii. 12. 15, and iii. 8. 54; *M'Intosh v. M'Queen*, 9 July 1829, vii. S. 882; see Bank. iii. 5. 112, 113; A S. 8 July 1831, § 3.

The privilege of the *annus deliberandi* is not peculiar to heirs of line. Heirs of provision are also entitled to it; *Forrest v. Scot*, Feb. 1684, M. 6876. Where the heir is posthumous, the year runs only from his birth, *Summers v. Simson and Gardner*, 23 Dec. 1757, M. 6882; Ersk. iii. 8. 54. Where one was charged as apparent heir to his father, it was held a good objection, that a year from the death of his elder brother, who was heir apparent, had not expired; for the year can only run from the time the succession opens, *Stivenson v. Tweedie*, 28 Nov. 1649, i. Sup. 422; *Bruce v. E. of Southesk*, Feb. 1704, M. 5329. The time from which the year begins to run is not, however, to be extended, on the ground that the heir-apparent has not received intimation of his predecessor's death, till the year has nearly expired, for it would be highly inexpedient and unjust were the diligence of creditors to depend on such considerations; *Henderson v. Campbell*, 14 Nov. 1783, M. 5292.

If the heir had entered to the ancestor within the year, or had behaved as heir, or incurred a passive title, there was

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<sup>1</sup> See *infra*, P. iv. 9. 9, and as to adjudications following on such a decree of constitution, *ibid.*

no need for a general charge, and he could not, of course, plead the *annus deliberandi*, as the only object of it is to give the heir time to consider whether he will enter heir or not, *Laird Glenkindy v. Crawford*, 24 Jan. 1627, M. 6869; *Lore v. Crawford*, 27 Jan. 1627, M. 6869; *Hamilton v. Bonar*, 6 Feb. 1677, M. 6873. By A. S. 23 Nov. 1711, § 5, in processes of ranking and sale, "if the debtor or any of the creditors-defenders compearing and producing, shall happen to die, the process shall stop no longer than till their apparent heir be cited to compear, upon a diligence, without any necessity of waiting the year of deliberation, or transferring the process *passive* against them," *infra* P. v. 8. 20. It would also appear that real actions, having no personal conclusion against the heir, may be pursued by the widow of the last proprietor, within the year for her liferent annuity, otherwise she might not have the means of subsistence, *Pitcairn v. Walwood*, 4 Dec. 1702, M. 6876; Ersk. iii. 8. 55; Bell's Prin. § 1685.

If the heir have renounced the succession, he cannot plead the *annus deliberandi*; and, indeed, the same reason holds here as where he has been served heir, and the period of deliberation must be considered to be expired when he has renounced; *Blair v. Brown*, 14 July 1631, M. 6870. Where an heir intends to renounce his predecessor's succession, he must enter appearance in the action, by lodging defences,<sup>1</sup>

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<sup>1</sup> Formal defences are generally dispensed with. A minute of renunciation is given in, in such terms as these: "B. (counsel's surname), on behalf of the defender C. D., stated to the Lord Ordinary that his client does not represent the deceased E. F., his father, (*or as the case may be*), and in behalf of his said client, judicially renounced all right of representation and succession competent to him accordingly."

"The Lord Ordinary having heard parties procurators, finds it not necessary that the defender C. D. should give in defences, as he has now renounced the succession of his father E. D. And in respect of the signed minute now lodged on behalf of the said C. D., renouncing his right



and produce along with them his renunciation, which may be in the form of a minute, signed by counsel. In such a case, the heir is entitled to the expenses he has incurred, *Caruthers v. Phillips* or *Hog, &c.*, 28 Nov. 1828, vii. S. 81. *Infra* P. iv. 9. 14.

Real actions, such as pointing the ground, &c. and declarators, where there is no personal conclusion against the heir, might have been pursued, without a previous charge. This rule in one old case was held to apply even to the proving of the tenor of a personal bond, granted by the ancestor, *Brodie v. Douglas*, 12 Dec. 1672, M. 2172. But these actions cannot be pursued within the year, Ersk. iii. 8. 55; and this rule holds not merely in cases where the heir cannot plead the proper defences without incurring a passive title, but also where his appearance would have no such effect, *Stewart v. Anderson*, 25 Feb. 1749, M. 6881; and even although the pursuer consented, that nothing to be done *intra annum* should infer a passive title. The object, in this case, was to examine aged witnesses, two of whom had died. In a former case, the defender having died, a transference was raised within the year, but the Lords would not grant a commission to examine old witnesses till after the year, *Duff v. Innes*, Mar. 1683, ii. Sup. 37. The A. S. 11 July 1828, § 117, authorizes the Lord Ordinary on the bills, in vacation, to allow a proof by old witnesses, not under seventy years of age, or those labouring under severe indisposition, or about to go abroad for a considerable period, on production of a depending process, in the Court of Session, or a summons, or a suspension, duly

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of representation of, or succession to the said deceased E. D., his father, assoilzies him from the passive titles libelled, and decerns. But decerns against him *cognitionis causa tantum*, to the end and effect, that the pursuer may attach, as law will, the means, estate, and effects, heritable and moveable, of his said deceased debtor, E. D. Finds expenses due to the said C. D., and decerns."

executed, and under certain conditions therein enumerated ; but it does not appear that this regulation would authorize an examination *intra annum*. P. iii. 7. 3. The objection, that proceedings have been taken *intra annum*, is not personal to the heir, but may be pleaded by competing creditors, *Summers v. Simpson and Gardner*, 24 Dec. 1757, M. 6882.

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## CHAPTER II.

### OF THE SUMMONS.

PROCEEDINGS in the Court of Session commence with a Summons, a Note of Advocation, or of Suspension, a Petition, or a Petition and Complaint. The two latter are peculiar to the Inner-house, or to the Lord Ordinary on the bills in vacation, and will fall to be considered afterwards. All advocations and suspensions formerly originated in the Bill Chamber, but in certain cases Notes of Advocation may now be brought by lodging them with one of the depute clerks of session, as will be more fully noticed below, P. iii. 12. 2.

#### SECT. I.—DEFINITION AND PARTS OF SUMMONS.

A Summons may be defined to be a writ, by which a party is called into the Court of Session to answer the claim insisted on, or to allege a reasonable cause to the contrary, and, on failure, to see decree pronounced against him. It may be divided into four parts :—1st, The premises or narrative, which sets forth the nature and extent of the demand. 2d, The subsumption, which generally states the refusal of the defender to satisfy the claim. 3d, The conclusions, which specify the decree asked to be pronounced. And, 4th, The will, which is the warrant to messengers-at-arms to cite the defender to appear.

## SECT. II.—MUCH ACCURACY NOW REQUIRED IN LIBELLING.

The writers to the signet have the exclusive privilege of libelling and preparing such summonses as cannot pass the signet without a bill, and the formal part of all other summonses passing the signet; *S. S. C. v. W. S.*, 25 Feb. 1800, *M. Apx. I. College of Justice*. As all writs passing the signet, except letters of diligences, must be subscribed by a writer to the signet, 1695, c. 40, (c. 71, *Th. Ed. ix.* 462), every summons must be signed by one of that body. By the regulations of the society, the keeper of the signet is prohibited from signeting any summons until it is fully libelled and signed: *Printed Regulations*, 1811, p. 18. Summonses, however, in maritime and consistorial actions, which are now competent in the Court of Session, were ordered to be signed by a principal or depute clerk of session, and it was declared unnecessary that they should pass the signet, 1 *Gul. IV.* c. 69, (23 July 1830), § 40. By 1 and 2 *Vict. c.* 118, (16 Aug. 1838), § 29, it is enacted, “that summonses in Admiralty causes may be raised and pass under the signet in like manner as other summonses before the Court of Session now do.” But no alteration has taken place as to consistorial summonses; *Buxton v. Buxton*, 16 Jan. 1845, vii. D. 1063.

Before the changes on judicial procedure, consequent on the passing of the Judicature Act in 1825, (6 *Geo. IV.* c. 120), summonses were often drawn in a loose and inaccurate manner, and many defects in them were allowed to be supplied by a condescence. Cases were sometimes decided on grounds not contained in the summons, but brought forward for the first time in a representation against the Lord Ordinary’s interlocutor, and which were never made a part of the summons, by an amendment of the libel; *Peebles v. Watson*,

9 Dec. 1825, iv. S. 290, (N. E. 293). That act, however, introduced a stricter form of pleading, and objections, which it would formerly have been held ridiculous to state, will now prove fatal. When it is considered how prejudicial the dismissal of a summons for informality may prove, by the loss of time it must occasion—by depriving the pursuer of the benefit of the diligence he may have used on it, and by which his demand might have been secured—by the elapso of the time limited for bringing certain actions, as those for usury, against officers of excise, &c. &c.—by losing the benefit of litigiousity, and of the interruption of prescription,—the practitioner will see that not only is his professional character at stake by any want of accuracy and precision, but that he may be compelled to pay the damage incurred by his ignorance or inattention.

SECT. III.—FORM OF SUMMONS—CASES ILLUSTRATING  
STRICTNESS NOW REQUIRED.

Forms of most of the summonses in ordinary use are to be found in our style books; and, from the great variety of matters that may be the subject of actions, it is impossible to lay down any specific rules for their preparation. The above statute (§ 2), enacts in general, “that in all ordinary actions in the Court of Session, the pursuer or pursuers shall, in the summons, set forth in explicit terms the nature, extent, and grounds of the complaint or cause of action, and the conclusions which, according to the form of the particular action, the said pursuer or pursuers shall by the law and practice of Scotland be entitled to deduce therefrom.” The best commentary on this enactment is furnished by the decisions which have been pronounced since its date. Thus, if one guarantee bills discounted, the summons against the guarantor must state distinctly that they were *discounted*,

and not merely that they were indorsed ; *Macartney v. Wilson*, Lord Medwyn, iii. Jur. Styles, p. 962. A summons set forth that the defender indorsed a bill to the pursuer, when the fact was that the defender indorsed it to a bank, and that the pursuer paid it to the bank, and received it without any new indorsation, the original continuing blank ; this discrepancy proved fatal to the summons ; *Ewing's Trs. and Robison v. Farquharson*, 25 Feb. 1829, vii. S. 464. A pursuer being described in a summons of *cessio* as merchant in Glasgow, and the certificate of imprisonment bearing that he was a hatter in Paisley, the summons was dismissed ; *Ramage v. His Crers.*, 27 May 1828, vi. S. 853. The same result followed where a party raised an action in November, libelling, that in May preceding, he had sustained damage by the negligence of road trustees, and the act constituting the trust had been repealed in June, and a new one differing in many particulars passed ; and in concluding for damages against the road trustees, he did not specify which set of trustees, nor set forth distinctly the grounds of action ; *Coldstream and Scales v. Threshie*, 18 Feb. 1832, x. S. 356. A summons for payment of rent alleged to be due for the farm of K., " possessed by the defender or her subtenants under the pursuer, for crop and year 1833," in which the pursuer described himself as Chief of a clan, but did not libel any other right or title to the subjects, was dismissed as irrelevant ; *Mackintosh v. Mackintosh*, 9 June 1835, xiii. S. 884. Under a summons libelling that a defender was liable as " owner or part owner" for disbursements made on account of a ship in a foreign port, but he was neither owner nor part owner, it was held that, whether he was liable on other grounds or not, the action, as laid, could not be sustained ; *Dempster and Co. v. Drybrough, &c.*, 28 Nov. 1837, xvi. S. 109. See also *Brown v. Moncur*, 29 June 1837, xv. S. 1230 ; *Hunter v. Orr*, 8 Dec. 1837,

xvi. S. 201; *Kirkland v. Cadell*, 6 July 1839, xiv. F. C. 1204; *Drummond (Second Fife Bank) v. Drummond, (First Fife Bank)*, 11 Mar. 1841, iii. D. 891; *Holcombe v. Stewart*, 1 June 1842, iv. D. 1316; *Cox v. Tait, &c.*, 29 June 1843, v. D. 1283; *Hunter v. Thomson*, 29 June 1843, *ibid.* 1285; *Hutchison v. Ferrier*, 18 July 1846, viii. D. 1228; and *Barr v. Bruce*, 4 Dec. 1846, ix. D. 222; affording similar illustrations of the necessity of correctly libelling the precise facts upon which the defender's liability rests. A summons which libelled that a company as such, and the partners individually, were due a certain sum uplifted by one or other of them on the pursuer's account, but not having set forth by what authority it was uplifted, or that it was by or for the company, and not specifying by which partner the money had been uplifted, was held irrelevant, and ordered to be amended, *Stirling and Mandy. v. Lockhart and Swan*, 30 May 1832, (outer-house), S. Jur. iv. 480.

It was once held that a bill or promissory-note, after it is prescribed, ceases to be a document of debt, that an action for the sum contained in it cannot proceed on the bill, that it is not enough to libel that the defender is due the sum as contained in the bill, and that if there are other documents establishing the debt, they must be specially libelled on; *Stirling v. Lang*, 4 Mar. 1830, viii. S. 638. It had previously been laid down that though the bill in such a case be an adminicle of evidence, the proof on which judgment must proceed is the writ or oath of the debtor; *Laidlaw v. Hamilton*, 31 May 1826, iv. S. i. 636, (N. E. 644); i. Bell's Com. 394. But in *Christie v. Henderson and Murdoch*, 19 June 1833, xi. S. 744, the court decided that it was competent to libel on a prescribed bill, as prescription does not annihilate the bill, but merely destroys every presumption which formerly existed in favour of the holder, and against payment, while it raises up a counter presumption in favour of payment, which can only be redargued by the writ or oath of the

debtor. But the preferable mode is to libel on the debt or transaction, as existing separately and independently of the bill, using it if necessary, merely as an adminicle of evidence. See *Hunter v. Thomson, &c.*, 29 June 1843, v. D. 1285, and references. Where a bill had been destroyed by vitiation, an action grounded on the bill was dismissed; *Murdoch, Robertson and Co. v. Lee, Rodger and Co.*, House of Lords, 26 Dec. 1801, i. Bell, Com. 391. Thus, also, a summons founded exclusively on the act 1701, cannot support a conclusion for damages at common law, *Millar v. Mills and Vary*, 21 May 1831, ix. S. 625; and under a summons libelling a special agreement as the ground of debt, a pursuer is not entitled to resort to other grounds; *Cunningham v. McGachen, &c.*, 17 Feb. 1831, ix. S. 472; *Finlayson v. Fisher*, 22 Jan. 1828, vi. S. 419. Again, a person who has raised a summons for delivery of bills as granted without value, cannot be allowed in that action to prove they are forgeries, *Ker v. Baird*, 10 July 1827, v. S. 926, (N. E. 860); and a pursuer founding in his summons, on an alleged verbal agreement between himself and the defender, is not entitled, under that libel, to make out a case founded on a stipulation contained in a lease from the defender to a third party, *Still's Trs. v. Chivas*, 12 Nov. 1829, viii. S. 9. But, under a summons of count and reckoning for a sum intromitted with, facts and pleas may be stated by the pursuer in answer to the statements of the defender, whereby he endeavours to discharge himself of the claim, for this is evidently different from attempting to make out a new ground of action, *Banner v. Gibsons*, 24 Nov. 1830, ix. S. 61. It has even been held fatal to the instance, that the summons libelled on a bill as signed by the party, instead of being signed per procurator, though the name of the party merely appeared on the bill, but the pursuer himself was the procurator, *Jackson and Husband v. Williamson and Henderson*, 9 Dec. 1825, iv. S. 292, (N. E. 296). This decision was confirmed by the subsequent case of *Muir v. Braidwoods*, 30

Nov. 1831; x. S. 83. Under a summons concluding against executors to invest the funds in their hands, it is incompetent to find them liable, conjunctly and severally, in payment, on account of the irregularity with which they have executed their office, *Carruthers v. Hall, &c.* 25 Nov. 1830, ix. S. 66. As an instance, also, of the necessity of setting forth specifically the ground of action, another case may be mentioned, *Fergusson v. McGachen*, 11 Mar. 1829, vii. S. 580, where it was found, that although a summons against an heir, on the passive titles, may be competently insisted in, within the *annus deliberandi*, where he has behaved as heir, yet this *gestio* must be expressly libelled; and it was not held sufficient, where the heir had been charged to enter, (charges being then in use), and the summons proceeded on the charge,—that the summons contained the general averment that the pursuer was liable on one or other of the passive titles known in law.

It is evident, that the premises must be sufficient to support the conclusions. Thus, if a party might admit the whole averments in the premises, and yet might deny the conclusion, such a summons would be dismissed. To take as an example; a summons of reduction on the act 1696, c. 5. (Th. Ed. x. 33), which proceeds on the ground of bankruptcy. If the libel did not distinctly set forth the bankruptcy of the party at the date of the transaction, or within the statutory period, it could not be sustained; as a most material averment, and that on which the whole action rests, is omitted. Such a summons was dismissed under the old practice, nor would the court allow so gross an omission to be supplied by a supplementary action, *Wood v. Dalrymple*, 4 Dec. 1823, ii. S. 555, (N. E. 480). A supplementary summons of reduction having reference to a transaction falling under the act 1696, c. 5, but not libelling on the act, and containing no reductive conclusions, was dismissed as inept, *Pattison v. Allan and Co.*, 28 Aug. 1833, vii. W. and S. 26. Suppose a



reduction were raised on the ground of facility and lesion, or fraud and circumvention, but in pleading the case before the Lord Ordinary, the ground of reduction insisted in was the want of power to grant the deed as proceeding *a non domino*, and the Lord Ordinary, accordingly, set it aside on this ground, such an interlocutor could not be sustained; *Peacock, &c. v. Glen*, 24 Nov. 1821, i. S. 168, (N. E. 160). In the same way, if the ground of reduction set forth is fraud, and it appears, on trial, that there is no fraud, but error in *essentialibus*, the action will be dismissed, *Balmer v. Hogarth, &c.* 11 Mar. 1830, viii. S. 715.

A son raised a summons libelling on a contract between him and his father, binding themselves to secure provisions for their spouses and children; and the son claimed payment to himself of interest on these sums,—action dismissed, *Graham v. Graham*, 11 Mar. 1823, ii. S. 290, (N. E. 254). A summons and relative condescendence, were held irrelevant to sustain a claim for the price of a vessel, in respect the missives of sale libelled upon, did not recite the certificate in terms of the registry act then in force, 6 Geo. IV. c. 110, and the conclusion for the price was disconform to the narrative of the facts, *Inglis v. Lane and Co.*, 23 Feb. 1832, x. S. 368. A lady raised an action against her agent, alleging that he had bought a house for her, and paid the price with her money without getting a title, although it was burdened, and concluding for repetition of her money, but not specially for freedom from the bargain; held that under the summons she could not insist on getting free of the contract, *Brown v. Cheyne and M'Kean*, 1 Mar. 1833, xi. S. 497; see also the cases of the *Mags. of Edinburgh v. Horsburgh*, 27 Feb. 1835, xiii. S. 571; *M'Lellan v. Newall, &c.*, 6 Mar. 1835, *ibid.* 617; *Munro or Ross and Husband v. Paul*, 9 Mar. 1837, xv. S. 780, and *Chirnside or Jeffrey v. Crawford*, 11 July 1839, i. D. 1252, furnishing examples of this rule of pleading.

The title of the pursuer must also be correctly set forth. It is not enough that he has a good title, if he has not that which he sets forth. Thus, a party libelled that he was joint proprietor with A. and B., whereas he, and two others besides, were joint proprietors with A. and B; his action was therefore dismissed, without inquiry whether he had a sufficient title or not; *Pollock v. Mather, &c.*, 28 May 1829, vii. S. 675. Where actions are raised by the office-bearers of associations, their title to pursue must be distinctly set forth, otherwise the action will be dismissed; *Gillies v. Hunter, &c.*, 11 Jan. 1831, ix. S. 257, (*supra*, P. ii. 1. 14). Again, where the title libelled is not sufficient to support the conclusions, all procedure in the action is inept, and the acquiescence of the defender is not sufficient to validate the procedure, acquiescence merely barring the objector where the objection is, that the title libelled is not in the pursuer; *M'Indoe, &c. v. Lyon, &c.*, 7 Dec. 1826, v. S. 92, (N. E. 85). The same precision is necessary in describing the character of the defenders; for it is not only necessary to call the proper defenders, but to call them in their proper character; *M'Neill v. Littledales*, 3 June 1829, vii. S. 696. Thus, in libelling a summons against trustees and executors under a trust-deed and settlement, it seems proper to state, that they are the "accepting and acting trustees and executors of the deceased A. B., and, as such, intromitting with and in the management of his estate, and thereby representing him, as trustees and executors foresaid;" for, if it is merely stated that they are trustees and executors, the action may be met by the defence, that they do not represent the deceased on any of the passive titles, and have neither made up any title to the heritable estate of the deceased, nor been confirmed executors to him; *Rose v. M'Leay and Horne*, 30 June 1827, v. S. 883, (N. E. 820). So, an action against one "as judicial factor on an estate," when he had merely been named by the Lord

Ordinary, who could not appoint a judicial factor, and the interlocutor had never been extracted, was dismissed; *Greenhill v. Gordon*, 11 Mar. 1823, ii. S. 291, (N. E. 256). Where a summons libelled on a debt as due by a party as "agent or manager" for a distillery company, it was held that the partners of the company, the proprietors of the distillery, ought to have been brought into the field; *M'Millan and M'Kellar v. M'Culloch*, 28 Jan. 1842, iv. D. 492. An error in the Christian name of the defender, though otherwise correctly designated, will be equally fatal, *Dalglish v. Hamilton*, 6 July 1753, M. 4163; *Dickson v. Gibson*, 13 Feb. 1745, M. 8859. In a summons against the magistrates and town-council of a burgh, or the officers of state, it is unnecessary to mention their names particularly; *Lockhart v. Magistrates of Lanerk*, July 1752, M. 11,993, (*infra*, p. 240). A summons may, in some cases, be raised for a sum, though the term of payment be not come. Thus, in an action for arrears of rent, the current rent may be concluded for, "the term of payment being first come and bygone;" *Woodward, &c. v. Wilson*, 10 Mar. 1829, vii. S. 566. *Infra* Sect. vii.

#### SECT. IV.—PENAL ACTIONS.

When the conclusions of a summons, or of a petition and complaint, are of a highly penal nature, (whether the procedure requires the concurrence of the public prosecutor or not), as in cases of usury, forgery, fraudulent bankruptcy, or in proceedings concluding for payment of heavy pecuniary penalties, the greatest accuracy and precision is required. The time and place where the offence was committed must be distinctly libelled, although it is often difficult to make such a specification; or at least the pursuer must state all he knows, and then set forth that it is not in his power, after every enquiry, to be more specific. The person against whom the

charge is made must be clearly pointed out; and, in so far as precision and accuracy are required, there appears little distinction between such a summons or complaint, and an indictment in a criminal court. It seems even to be held, that there must be a list of witnesses, by whom the accusation is proposed to be proved, appended to the summons or complaint. Neither can such proceedings be directed against a mercantile company, as such. The individual partners only can be punished; and the charge must be made against them as individuals; *Myles v. Finlayson and Marshall*, 25 Jan. 1830, ix. S. 331, and authorities there quoted. *Supra*, P. ii. 1. 15, *in fin.*

SECT. V.—WHEN MUST MALICE BE LIBELLED.

In raising actions of damages against justices of the peace, for acts done by them as justices, the provisions of the act 43 Geo. III. c. 141, (11 Aug. 1803), commonly called the Twopenny Act, must be attended to. This act provides, (§ 1), that unless the declaration in the action sets forth, that the acts complained of “were done maliciously, and without any reasonable or probable cause,” no higher damage than twopence, and no expenses whatever shall be recovered; and if the justice can prove that the plaintiff was guilty of the offence of which he was convicted, or for which he was apprehended, and that he suffered no greater punishment than was assigned by law for such offence, no damage or expenses shall be awarded against him. The above act is “extended to all inferior judges and magistrates in Scotland, in regard to any sentence pronounced, or proceeding had in any criminal trial,” 9 Geo. IV. c. 29, (19 June 1828), § 26, and to “all acts done by any such judge or magistrate in apprehending any party, or in regard to any criminal case or proceeding, or to any prosecution for a pecuniary penalty,” 11 Geo. IV. and 1 Wm. IV. c. 37.

(16 July 1830), § 13. But still it is not necessary to libel malice in every action of damages against justices. Where their proceedings have been grossly irregular and illegal, malice need not be averred; *Richardson v. Williamson, &c.*, 1 June 1832, x. S. 607; *Strachan v. Stoddart*, 13 Nov. 1828, vii. S. 4. In general, malice must be averred in all actions of damages, whether against justices or private individuals, where it is not presumed by law. It is not necessary to aver malice in ordinary actions for libel, as the law presumes it. The same is true where one receives injury from persons *versantes in illicito*; *M'Lauchlan v. Monach, &c.*, 16 Dec. 1823, ii. S. 590, (N. E. 506). In that case, a statement that a party had been knocked down and injured by one of two persons who were riding furiously on a road, was held relevant to infer damages against the one who had not been the direct cause of the injury. But where malice must be proved, as where the defender stands in a privileged situation, it must be averred. Where a party had arrested on the dependence of an action, and apprehended a party as in *meditatione fugæ*, both on sufficient grounds, it was held, that a summons concluding for damages was irrelevant, which merely stated the proceedings to be "nimious, illegal, and unwarrantable," but not averring malice, which in such a case required to be proved; *Duff v. Bradberry*, 19 May 1825, iv. S. 22, (N. E. 23). But see *Strachan v. Monro*, 5 Dec. 1844, vii. D. 178 and 399. In actions of damages for defamation in judicial proceedings, there being *prima facie* presumption against malice, as the defender is in a situation of privilege, it must be specially averred and proved; *Davidson v. Megget*, 12 May 1821, i. S. 3; *Yeats v. Ramsay*, 6 Dec. 1825, iv. S. 275, (N. E. 279); *Robertson v. Allardyce*, 13 Dec. 1827, vi. S. 242, 8 April 1830, iv. W. and S. 102; *Swinton v. Taylors*, 8 June 1821, i. S. 59, (N. E. 60). But where a master had verbally charged his servant with fraud

before a justice of the peace, and examined a number of witnesses, without any warrant, it was held not necessary to libel malice, as in a regular judicial proceeding; *Smith v. Innes*, 15 Feb. 1827, v. S. 364, (N. E. 337). Various other illustrations of the necessity of averring and proving malice in particular circumstances, will be found in Mr. M'Farlane's Practice of the Jury Court, p. 53, *et seq.*; and in the subsequent cases of *Manson v. Macara*, 7 Dec. 1839, ii. D. 208; *Adam v. Allan*, 23 June 1841, iii. D. 1058; and *Fenton v. Currie*, 22 Feb. 1843, v. D. 705; it is now the general practice in libelling such summonses of damages to insert malice, it being competent to drop it out of the record or issue, as the cause advances; *Ibid*; *Dauney and Russell v. Manuel, &c.*, 29 June 1836, xiv. S. 1037.

Where a summons charges two or more defenders jointly, with having conceived malice against the pursuer, and of having formed a design to injure him, by defaming his character, and states certain joint acts done with this view, it is competent to charge further acts of defamation, though done separately; more especially where the summons concludes alternately for a joint or for a several liability. Neither is it any objection to a summons for reparation of injury done by a private party in the course of judicial proceedings, that it does not libel want of probable cause; for whatever may have been done in England, it has not been the practice in this country; *M'Kenzie v. Reid and Nicolson*, 2 Dec. 1831, x. S. 89; *Marianski v. Henderson*, 17 June 1841, iii. D. 1036.

#### SECT. VI.—DATE, &C. OF SUMMONS.

The date of an ordinary summons is held to be an essential part, *Taylor v. Malcolm*, 5 Mar. 1829, F. C.; and, consequently, if written on an erasure, the summons will be dismissed, *Ibid*, and same case, vii. S. 547. So in *Cooper v. his Crers.*, 4 July 1833, xi. S. 896, an objection to a sum-

mons of *cessio*, that it was dated in the fourth year of the king's reign, while the third year of the reign was still current, was sustained. But where a case had been many years in court, and a record made up but not closed, an objection that there was an erasure in the date of the year of the king's reign was not listened to, *Robinson, &c. v. Jeudwine*, 7 July 1835, xiii. S. 1062; see also *Henry v. Mather*, 25 Feb. 1837, xv. S. 676; and *Ferrier v. Ross, &c.*, 7 Mar. 1833, xi. S. 531, to the same effect. But letters of suspension were dismissed as incompetent and incapable of amendment, on the ground that the date of the letters was not that of the passing of the bill, and the objection was held to be *pars judicis*, and not barred, although not stated till considerable progress had been made in preparing the cause, *Campbell v. Fotheringham*, 28 June 1826, iv. S. 774. In *Ferrier v. Jackson*, 26 May 1838, it was held that the figure 8 of the year of grace 1838 annexed to the date of a summons, being written on an erasure, does not vitiate the summons, the year of the Queen's reign being correctly given, xvi. S. 1049. Erasures in any part of the summons, are extremely dangerous; *Crichton v. Watt*, 25 Nov. 1830, ix. S. 68. In a privileged summons, the omission of the words "*Ex deliberatione Dominorum concilii*," was held a good objection by Lord Moncreiff; *Sampson v. Shanks*, 12 Nov. 1829, S. Jur. ii. 30.

SECT. VII.—SUMMONS SHOULD BE CONCISE AND DEFINITE, &c.

But though the summons ought to be accurately libelled, it should also be as concise and specific as possible. The object should be, to make the summons pointed and precise in point of fact, and correct and logical in point of conclusion. Prolivity in details, expositions of evidence, or displays of circumstances, are quite out of place in a summons. All superfluous matter, quotation of letters, title-

deeds, and of documents in general, *Charles v. South District Market Co.*, 28 Feb. 1826, iv. S. 506, (N. E. 514), flights of imagination, Lord Wyndford's Speech in *Robertson v. Boswell and Allardyce*, 8 April 1830, iv. W. and S. 111, and S. Jur. ii. 358, ought to be avoided. Nothing can be more contrary to the spirit and intention of the statute, than unnecessary amplitude. And in such cases, the Lord Ordinary may either throw out the summons altogether, or order it to be amended, by striking out the irrelevant matter; and, in either case, the defender is entitled to his expenses; 6 Geo. IV. c. 120, (*Judic. Act*), § 6. But in an action of proving the tenor of a bond, the court held that its tenor should have been engrossed in the libel; *Begbie v. Fell*, 9 Mar. 1822, i. S. 391, (N. E. 365). Any statements injurious to one not a party to the process; or improper, such as explanations why a party did not challenge another to fight a duel, will be struck out; *Herdman v. Young*, 11 Dec. 1744, M. 13,987; *Paterson v. Shaw*, 20 Feb. 1830, viii. S. 574, 578, Notes. Care ought to be taken that no averments, except those necessary to support the conclusions, be made. Thus, a party having unnecessarily libelled on a deed as onerous, it was held, that though he was not bound to prove onerosity, he was liable for the expenses occasioned by this averment; *Hamilton v. M'Ghie*, 4 Dec. 1828, vii. S. 140. But objections of a more critical nature will not be listened to. Thus, though the correct form of libelling a summons for an account of furnishings is, "for goods sold and delivered," it has been held sufficient to say the sum is due "per account herewith produced, and here referred to, and held as repeated *brevitatis causa*;" *Newberry and Sons v. Abbey*, 13 Nov. 1827, vi. S. 7. And forgery being pleaded in defence against a summons for payment of two bills specially libelled on, it was held competent, under such summons, to prove that the bills were delivered by the party himself as genuine, and to pro-



nounce decree against the defender, *Miller v. Little*, 22 Jan. 1831, ix. S. 328. Under a summons of reduction calling for a settlement described as having two codicils attached thereto, it was found competent to take an issue as to the codicils, as well as the principal settlement, although the summons only concluded for reduction "of the foresaid disposition and settlement," without specially noticing the codicils, *Donaldsons v. Donaldson's Trs.* 8 Mar. 1831, ix. S. 565; and a summons concluding against an heir of entail for ameliorations generally, was held to include a claim for them to the extent of a power under the entail to contract debt, though not specially founded on in the summons; *Innes v. D. of Gordon*, 26 May 1831, ix. S. 632. A summons, averring that the pursuer had received an anonymous letter through the post-office on a certain date, and, after quoting the letter, and stating it to be false, malicious, and injurious, and then setting forth, that "the letter was composed and sent, or was written and sent, or was sent in the knowledge of its contents, by the defender," was held sufficiently specific; *Lundie or Compton v. Home*, 13 Dec. 1831, x. S. 125. Neither has it been held a good objection to a summons founding on a guarantee for the price of yarns, and on an account, that it was not specifically set forth that the sum sued for was the price of yarns, and the account was not more specific than the summons; *Russell and Co. v. Stewart*, 22 Jan. 1829, vii. S. 302. Nor where a party has been sequestrated since the date of the cause of action, and the sequestration has terminated before raising the summons, is it necessary, in order to set forth a proper title to pursue, to libel that the party has been sequestrated and retrocessed, at least where the sequestrated estate consists entirely of moveables, as it is not usual, in such cases, to grant a retrocession; *Ibid.* In the same way, it is not a valid objection to an action against a foreigner, proceeding on an

arrestment *ad fund. juris.* that it is not set forth in the summons that arrestments have been used; *St. Patrick Assurance Co., &c. v. Brebner*, 14 Nov. 1829, viii. S. 51; and where a summons set forth that the sum claimed had been advanced on a certain day, and it turned out that it was advanced at different times in various sums, the pursuer was held still entitled to recover under the summons; *M'Donnell v. Rankine*, 26 May 1830, viii. S. 815. Even errors have been overlooked. Thus, a woman having raised a summons, concluding for aliment of a bastard child from 3d February, when it was said to have been born, and it appearing from her oath that it was born 3d January, the Court, notwithstanding, adhered to the sheriff's interlocutor decerning for aliment from 3d February; but this was a favourable case. The Lord Ordinary had, however, assoilzied the defender, as the proof did not support the libel; and the court stated they would have adhered to his interlocutor, had they not considered it a mere clerical error, not requiring amendment; *Hutchison v. Thomas*, 10 July 1828, vi. S. 1130. But see *Barclay v. Alexander*, 26 Feb. 1846, viii. D. 549. The expense and delay occasioned in these cases, shew the necessity of drawing the libel accurately, and in clear and precise terms.

Where the original summons in a case was lost or mislaid, the court, of consent of parties, held a certified copy as equivalent thereto, and pronounced decree accordingly; *Watsons v. Scott*, 22 Feb. 1839, i. D. 548.

The competency of a summons must be judged of from the conclusions alone, and it is immaterial what conclusions might have been drawn, if this is not done. The pursuer must also set forth a real interest, and such an interest as the court has a right to judge of in the first instance; *Gifford v. Trail*, 8 July 1829, vii. S. 854; *supra*, P. ii. 1. 1 Neither can a party ask a court of law to declare a fact,

except as a step towards a farther libelled conclusion of his rights, *Ibid*; *Lyle and Bow v. Balfour*, 17 Nov. 1830, ix. S. 22.

Amendments of the libel and supplementary summonses will be considered afterwards. *Infra*, P. iii. 13. 5—6.

#### SECT. VIII.—CONCLUSION FOR EXPENSES.

Although it is now the general practice to conclude for expenses in the summons, yet this was not the older practice, and expenses may be awarded to the pursuer in a litigated cause, though they are not concluded for, or though a less sum is concluded for than ultimately arises. There is a difference between conclusions on the merits and those for expenses. As to the merits, the judge has no power, except as craved; but the expenses are not in existence when the summons is raised, and it is the duty of the judge to award expenses when the justice of the case requires it. Besides, full power is given to him by the act 1592, c. 144, (c. 62, Th. Ed. iii. 573), to award them either to the pursuer or defender; *Moodie v. Rhynd*, 15 Jan. 1774, Hailes, 550; *Heggie and Co. v. Stark and Selkrig*, and *Gordon v. Hyslop and Co.*, both dated 1 Mar. 1826, iv. S. 510 and 512, (N. E. 518 and 520); *Scott v. Wilson, &c.*, 10 Mar. 1829, vii. S. 566. In *Torrances v. Craufuird*, 8 Feb. 1822, i. S. 301, (N. E. 280), interim execution pending appeal was granted against a defender, although there was no conclusion for expenses in the summons; see also *M'Neil, &c. v. Agnew*, 5 July 1825, iv. S. 143, (N. E. 144). A conclusion for expenses ought always to be inserted, because it is doubtful if a party could otherwise take a decree for them, in absence of the defender.

#### SECT. IX.—FORM OF WILL

The Will of the summons is in general in one uniform style. It is the warrant to the messenger for citing the de-

fender. In consequence of the act 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 53; the A. S. 11 July 1828, § 22; A. S. 8 July 1831; and A. S. 24 Dec. 1838, (*Form of Extracts, &c.*), § 7, several alterations have been made on its form. The following is an example of the will of a summons against a minor forth of Scotland, which shews the style fully: "Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said A. B. defender, if within Scotland, personally, or at his dwelling-place, to compear before the Lords of Council and Session at Edinburgh, or where it may happen them to be at the time, upon the twenty-seventh day after the date of your citation, and if furth thereof, by delivery of a copy hereof at the office of the keeper of the record of edictal citations at Edinburgh,<sup>1</sup> in terms of the Statute and Act of Sederunt thereanent, to compear as aforesaid, upon the sixtieth day after the date of your citation; and also the tutors and curators of the said A. B. defender, if he any has, for their interest, at the market-cross of \_\_\_\_\_, if he be within Scotland, and if furth thereof, at the said office of the keeper of the record of edictal citations at Edinburgh, and in either case upon the same *induciæ* as required for the defender himself, in the hour of cause, with continuation of days, to answer at the instance of the pursuer," &c

The length of the *induciæ* in the case of privileged summonses must of course be attended to. In the case of diligence, a warrant for an edictal citation cannot be inserted without obtaining the authority of the court, by presenting

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<sup>1</sup> Till the last A. S. above quoted, the style was "at the record office of the keeper of the records of the Court of Session." A citation in the old form, after the passing of the A. S. of December 1838, was found inept, *Stephenson, &c v. Dunlop, &c.*, 9 July 1840, ii. D. 1366.

a bill in the Bill-Chamber, but such a warrant may be inserted in a summons without a bill. *Infra*, p. 236, 243.

#### SECT. X.—SUMMONSES REQUIRING BILLS.

Some summonses require bills or petitions, presented in the bill chamber, to authorize the keeper of the signet to affix it to those writs. This is the case with all privileged summonses, when passed on the short *induciæ*, except multiplepointings, (*infra* p. 230), also summonses of reduction improbation, interrupting the prescription of real rights, 1696, c. 19, (Th. Ed. x. 61); summonses in the Court of Session for a sum under £25, except those of members of the College of Justice, or against them, *supra* P. i. 2. 1–2, &c., and also in all cases in which the Lord Advocate's concurrence is necessary, *supra* P. ii. 1. 20. Bills for summonses of adjudication and ranking and sale are now abolished. *Infra*, P. iv. 9. 15, and v. 8. 2.

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### CHAPTER III.

#### OF THE INDUCIÆ AND EXECUTION OF THE SUMMONS.

##### A.—OF THE INDUCIÆ.

##### SECT. I.—OF ORDINARY SUMMONSES.

The period allowed to the defender between the execution of the summons and his appearance in court, is termed the *Induciæ*. It formerly varied in different cases; but, by 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 53, it is declared, “that all summonses shall proceed on one diet only, viz. privileged summonses against defenders within Scotland on one diet of six days; other summonses against defenders in Orkney and Shetland, a diet of forty days; and for all

other persons within Scotland, a diet of twenty-seven days; and for defenders out of Scotland, a diet of sixty days." And it is declared, that "where a person not having a dwelling-house occupied by his family or servants, shall have left his usual place of residence, and have been therefrom absent during the space of forty days, without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland."

This enactment has led to some doubts. Thus, though it is expressly said that all privileged summonses against persons in Scotland shall pass on six days, the court held that this did not apply to defenders in Orkney, and that they were entitled to an *induciæ* of forty days, in terms of the act 1685, c. 43, (c. 56, Th. Ed. viii. 494); *Hopkirk v. Sinclair and Nisbet*, 2 Feb. 1827, v.S., 273, (N. E. 254). The court had pronounced a similar decree under the 50 Geo. III. c. 112, (20 June 1810); *Hume and Co. v. Fleet*, 9 July 1811, F.C. It was found, previously to the above act of 6 Geo. IV. that a party having his dwelling-house occupied by his family in Scotland, might be cited there on the short *induciæ*, although he himself had been abroad for six months; *Fraser v. Reid and Auld*, 21 June 1821, i. S. 78, (N. E. 77). Where a person has granted a bond *de judicio sisti*, and specified a domicile within Scotland where he may be cited,—though he be a foreigner, and immediately leave Scotland, it is only necessary to cite him on the ordinary *induciæ* of twenty-seven days at this domicile, though the *induciæ* be not mentioned in the bond, for *quoad* this action he must be held as a domiciled Scotsman; *Horne v. Smith, &c.*, 18 Nov. 1823, ii. S. 500, (N. E. 441). In the edictal citation of tutors and curators, the ordinary *induciæ* need only be given if the minor be within Scotland, though they may be out of it; *Fairholm v. M'Kenzie*, 29 July 1710, M. 3709; *supra* P. ii. 1. 3. The proper *induciæ* must of course be specified in the summons;

but it is unnecessary to go farther into this matter, till we treat of the execution of the summons. But, in the first place, we must ascertain what summonses are privileged, as those alone pass upon the short *induciæ* of six days, when the defender is in Scotland.

#### SECT. II.—OF PRIVILEGED SUMMONSES.

Privileged summonses are such as are supposed to require a greater despatch than others. These summonses require a bill to be passed at the bill chamber, *supra* p. 228. By act of sederunt, (29 June 1672), it is declared that no summonses be privileged by the Lords' deliverance, except the following :—

1. Of removings. 2. Of recent spulzies and recent ejections, where the summons is execute within fifteen days after the committing of the deed. 3. Of intrusion. 4. Of succeeding in the vice. 5. Of aliment. 6. Of exhibition. 7. Of forthcoming. 8. Of transference. 9. Of pointing the ground. 10. Of wakening. 11. Of special declarator. 12. Of suspension. 13. Of preventor.<sup>1</sup> 14. Of transumpt. Summonses of multiplepointing, also, in practice, pass on an *induciæ* of six days. A bill ought, in every case, to be passed for privileged summonses on the short *induciæ*, though this, in the case of multiplepointings, is often neglected. When a multiplepointing contains conclusions of exoneration, it requires the ordinary *induciæ*; and all the above summonses may be raised on the ordinary *induciæ*, without a bill. When the defender is furth of Scotland, he must have the *induciæ* of sixty days.

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<sup>1</sup> “ This action is long ago obsolete.—Erskine's Institutes, B. iv. tit. 3, § 21.”—*New Form of Process*, (2d Ed. 1799), 35.

## B.—OF THE EXECUTION OF THE SUMMONS.

## SECT. I.—WHEN FULL COPIES ARE REQUIRED, &amp;c.

The summons being written out, signed by a writer to the signet, and signeted, or, if the case be of a consistorial nature, simply signed by a principal or depute-clerk of session, is then to be executed. In general full copies to the Will,<sup>1</sup> (often called doubles), are required to be served on the defender; A. S. 15 Feb. 1723, 1 Jan. 1726, and 19 Feb. 1742; but, where there are several defenders in the summons, unconnected with each other, each defender need only be served with a copy of the part of the summons which concerns himself. Where a summons was raised by the provisional committee of a projected railway company, against six parties who applied for shares, and to whom shares were allocated, concluding for payment of the deposit money, or alternatively for a sum as their proportion, due by the defenders, of the expense incurred in surveys, &c.,—in the copy served on one of the defenders, the names of the other five were not inserted, but blanks were left; and while the name of the defender on whom that copy was served, stood last in the principal, it stood at the top of the blank in the copy; Held that the citation was imperfect, and that the action should be dismissed, in respect that the defender had not, in terms of the act of sederunt, “received a full copy of such part” of the summons “as concerned him.” *Allardice, &c. v. Blakey*, 12 Jan. 1847, ix. D. 314.

The following summonses may be executed by short copies:—

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<sup>1</sup> “The Will,” as it is technically called, is the warrant from the Queen to cite the defender. It commences with the words “Our Will is,” &c.: hence its name. *Supra* P. ii. 2. 9.



1. Adjudication. 2. Maills and duties. 3. Ranking and sale. 4. Exhibition *ad deliberandum*. 5. Choosing curators. 6. Transumpt. 7. Wakening. 8. Multiplepoinding.<sup>1</sup> 9. Poinding the ground. 10. Forthcoming.

But a full double must be given to the heritor in a summons of poinding the ground,<sup>2</sup> and to the common debtor in a furthcoming. Summonses of ranking and sale and adjudication, are generally in practice executed against the debtor by full copies. "In all cases in which one and the same writ shall be executed, at one and the same time, against two or more persons as furth of Scotland, such execution may be made by delivery at the said office, (the record office of the keeper of the records of the Court of Session, *now* the office of the keeper of edictal citations),<sup>3</sup> of one copy only, provided that such copy bear upon its face that it is delivered for all and each of such persons;" A. S. 11 July 1828, § 22. The act of sederunt, 1 Jan. 1726, orders summonses of multiplepoinding to be executed by short copies; but, where there is a conclusion for exoneration, a full copy must be served. Also when a transference is conjoined with a wakening a full copy must be used.

Summonses, as well as other writs, passing under the signet, are addressed to Messengers at Arms, and can be executed by them alone, 1537, c. 58, (*i. e.* A. S. 27 May 1532, § 17, *supra* p. 2, Note 1); 1672, c. 6, (Th. Ed. viii. 64); 1693, c. 12, (c. 21, Th. Ed. ix. 271); but in very special cases, the court will authorize sheriff officers to execute such writs, *Mitchell, Suplt.*, 19 June 1764, M. 7355. Before putting a summons into the hands of a messenger for execution, it ought to be

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<sup>1</sup> In practice a Double is generally served on the common debtor.

<sup>2</sup> It has been said, that in actions "of Maills and Duties, perhaps the same rule ought to be followed." Bev. p. 239. In practice it is so.

<sup>3</sup> A. S. 24 Dec. 1838, (*Form of Extracts*), &c. § 7; *supra* P. i. 4. 9. p. 117.

examined to see that no material part of it is written on erasures, or in the form of marginal additions, without due notice in the docquet by the person who signs it.

The summons ought to be in possession of the messenger when he executes it. The law presumes that this is the fact, and he may refuse to show the summons to third parties not defenders, *Lermont v. Heirs of Lermont and Gordon*, 11 July 1699, M. 3096 and 3686; but it may be inferred from this case, that if the defender had demanded exhibition of it, and the messenger had not been able to comply with his request, the execution could not have been sustained. In criminal practice it is now no objection to the service of a libel, or to the citation of any juror or witness, that the officer who discharges the duty is not at the time possessed of the warrant of citation, 9 Geo. IV. c. 29, (19 June 1828), § 7. It is, however, believed, that summonses are often executed by the messenger without his being at the time in possession of the signeted copy. This fact may sometimes be proved by the execution of the summons itself; thus, suppose, after exhibiting the summons to the messenger in Edinburgh, it is sent off to a distant part of the country, to be executed against defenders there, executions may appear bearing the same date, at these distant places, and thus prove that one or other of the messengers could not have been in possession of the warrant at the date of execution, unless several copies of the summons had been signeted.

#### SECT. II.—WITNESSES.

Formerly two witnesses were required to attest the execution of writs. But by 1 and 2 Vict. c. 114. (16 Aug. 1838) § 32, it was enacted, that more than one witness should not be required, except in the case of poindings. Doubts having arisen regarding the interpretation of this provision, it is declared by 9 and 10 Vict. c. 67, (26 Aug. 1846), that

the former enactment "does and shall apply to all citations in all summonses, and to all cases whatsoever of services and execution, and that more than one witness is not and shall not be required for service or execution in any case, excepting only in cases of pouncing as aforesaid."<sup>1</sup> See *Calder v. Forbes*, 4 Feb. 1847, ix. D. 592. Witnesses must be beyond the age of puberty, *Davidson v. Charteris*, 12 Dec. 1738, M. 16899, although in some cases a pupil *pubertati proximus* has been sustained as a witness, *Home v. Home*, Nov. 1582, M. 8906; *D. of Queensberry v. Barker*, 7 July 1810, F. C. It does not appear that relationship to the messenger, or either of the parties, would be held to disqualify a witness, as it is settled it is no objection to a notary-public, *Reid, &c. v. Grindlay*, 19 Nov. 1830, ix. S. 31. It is incompetent, however, for a messenger to execute diligence on a bill for his own behoof and that of another party, *Dalgleish v. Scott, &c.*, 18 June 1822, i. S. 544, (N. E. 469); and a protest on a bill taken by a notary who is acceptor of the bill, is inept, *Russel v. Kirk*, 27 Nov. 1827, vi. S. 133. But there seems little doubt that infamy, though not held a disqualification to a witness in a private deed, because he is called by the subscribing party, who is therefore barred from stating the objection, would be a good objection to a witness to an execution. The act 1540, c. 75, (c. 10, Th. Ed. ii. 359), lays down very clearly the forms to be used in the executing of writs, and though it does not require witnesses, where the citation is personal, they are held to be necessary in all cases; for by the act 1686, c. 4, (c. 5, Th. Ed. viii. 586), all citations are required to be subscribed by the executors and witnesses; and the prior act 1681, c. 5,

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<sup>1</sup> No witnesses are required in citing jurors or witnesses in any case, civil or criminal, 1 Wm. IV. c. 37, (16 July 1830), § 7; or in citations under the Sequestration Act, 2 and 3 Vict. c. 41, (17 Aug. 1839), § 138.

(Th. Ed. viii. 242), expressly requires the presence of witnesses to give the citation the effect of interrupting prescription in real rights.

Messengers occasionally, it is believed, execute not only summonses, but diligence, without witnesses being present, and afterwards get any one to sign the execution. But this is extremely dangerous, of which there is a strong illustration in one case, *Campbells v. McNeil*, 18 Jan. 1799, M. 11120, where a summons which had been executed personally, and which the defender admitted to have received, was not sustained, even to the effect of interrupting the triennial prescription, because the witnesses subscribing the execution were not present when it was given; see also *Baillie v. Doig*, 2 Mar. 1790, M. 11286. The case of *Davidson*, *supra*, is also an authority on this point; see *infra*, sect. xiii.

Summonses are executed three ways, personally, at the dwelling-place, and edictally.

### SECT. III.—PERSONAL CITATION.

Little occurs to be said with regard to the personal execution. A citation may be given by delivering a copy of the summons, with copy citation annexed, to a party at any place, in the street, or in the sanctuary, &c. If the defender will not receive it, the messenger ought to mention this fact in his execution, and it is, of course, no objection to the citation. But where a party is entitled, by his residence, as an inhabitant of Orkney, to longer than the usual *induciæ*, can he be cited on the short *induciæ*, merely because he happens to be in another part of Scotland at the date of citation? It may be said that he is entitled to the long *induciæ* of forty days,—1st, Because the act 1685, c. 43, (c. 56, Th. Ed. viii. 494), declares, that “inhabitants of Orkney and Shetland” shall be entitled to the long *induciæ* without

taking any notice where they are cited; and, 2d, Because it may be presumed, that although temporarily in another part of Scotland, the defender's means and effects for payment of his debts are in Orkney, as well as the documents and vouchers by which he may resist the demand made against him. In the copy citation given to the debtor, he is not, as formerly, to be cited to a particular day, but to the 27th day (or whatever other day the *induciæ* requires) after the date of citation; A. S. 8 July 1831.

In general, the messenger can do nothing for which he has not an express warrant; yet in the case of summonses, though it may be otherwise with diligence, a warrant to cite a defender edictally is sufficient to authorize a personal citation, as it is held to include it, *Kirkconnel Gordon, v. Laird of Barnbarrow*, 2 Feb. 1628, i. Sup. 149; *L. Kirkconnel v. L. Barnbarroch*, (same case), M. 3682; *Cochran and Dykes v. Urquhart*, 12 June 1705, M. 3686, iv. Sup. 611: *Supra*, P. ii. 2. 9.

#### SECT. IV.—AT DWELLING-PLACE.

In treating of citations at the dwelling-place, it will be necessary to consider what is to be held a dwelling-place, or domicile. Now, the definition of a true domicile, as given in the Code, (Lib. x. tit. 39, § 7, *de Incolis*), is, "*Ubi quis Larem, Penates, rerumque ac fortunarum suarum Summam constituit, unde (rursus) non sit decessurus si nihil avocet; unde cum profectus est peregrinari videtur, quod si rediit peregrinari jam destitit.*" Where a party has constituted a domicile of this description, as by purchasing a house and furniture, engaging servants, and residing in it with his family, there can be no doubt that a citation there is good, though the defender may only have resided for a day or two, and that a citation left at his former residence, when his removal and new place of residence is generally

known in the neighbourhood, or may be learned by a little inquiry, would be null; *Gordon v. Campbell*, 30 Dec. 1702, M. 3702. Where a domicile of this kind is once established, it will not easily be done away with, although the defender may have been more than forty days absent, and have removed to another occasional residence, if he keeps possession of the former, by having it occupied by his servants and furniture, *Irvine v. Deuchar*, 13 Mar. 1707, Fount. M. 3703; *M'Culloch v. Gordon*, 11 Feb. 1674, M. 3701; *Mags. of Inverbervie, Petrs.*, 16 Feb. 1804, M. 12097; *Fraser v. Reid and Auld*, 21 June 1821, i. S. 76, (N. E. 77); *Scott v. Carnegie*, 3 June 1826, iv. S. 667, (N. E. 674). Ersk. i. 2. 16, defines a true domicile to be "the dwelling-place which a man chooses for a fixed abode to himself and his family; a pleasure house, therefore, to which he goes only by starts, is not a domicile, far less a friend's house, or an inn." In *Macdonald v. Sinclair, &c.*, 21 June 1843, v. D. 1253, one of four brothers, joint tenants of a farm, in an action of removing, was held effectually cited, in the circumstances, at a farm-house, where the others resided, although he lived and taught a school at a place some miles distant. A debtor was held well cited under the bankrupt act, by leaving the copy with his father, "within his said father's dwelling-house in N., with whom he lives and resides when not at sea," *Brown v. M'Callum*, 14 Feb. 1845, vii. D. 423.

In many cases, it may happen that a person has a domicile at different places at the same time, as where a landed gentleman has estates in different counties, with residences and servants at each, and resides sometimes at one, and sometimes at another, as in the above case of *Irvine*; or suppose a person resides half the year in Edinburgh, and the other half in the country, and keeps an establishment of servants at both houses, he may be cited at either, *Spottiswood v. Morison*, 15 July 1701, M. 4790; *Home v. Cra. of*

*Lady Eccles*, 30 July 1725, M. 3704; *Douglas and Heron v. Armstrong*, 23 Nov. 1779, M. 3700; see *Scott v. Carnegie*, 3 June 1826, iv. S. 667, (N. E. 674). The case of *Gordon*, supra, seems inconsistent with these decisions, but it was carried by a majority of only one, in a sederunt of nine judges; and it does not appear that there were any servants in the house in Edinburgh, when the summons was executed in the time of vacation.

But much less is necessary than a fixed residence to establish jurisdiction, to the effect of warranting a citation on a summons. Thus, Ersk. i. 2. 16, says, to prevent "disputes upon this point, a rule is received by custom, that where one has resided with his family for forty days, immediately preceding his citation, is to be deemed his domicile as to the question of jurisdiction." But it does not seem necessary the party should reside "with his family." For, in *Pater-son v. Fermour*, 20 Nov. 1672, M. 3724, the court was of opinion, that a domicile of forty days, staying at any place, though in an inn or hired chamber, was sufficient to sustain an ordinary citation; and in *Baillie v. Menzies*, 22 Dec. 1710, M. 3704, a residence of forty days at a friend's house was held enough. If he has only resided in the friend's house for a day or two, it is not sufficient, however, to create a domicile; *Bruce v. Sir James Hall, &c.*, 13 July 1708, M. 3696; see case of *Home v. Lady Eccles*, supra, M. 3704. In a later case, *Calder v. Wood*, 19 Jan. 1798, M. Apx., *Execution*, No. 1, a Scotsman who had resided for five years abroad, having returned on a temporary visit, was unanimously found to be properly cited, by leaving a copy of a summons for him at the lodgings he had occupied in Glasgow for forty days, though he had quitted these lodgings two or three days before the execution, and was then in Edinburgh, on his way to England.

But a domicile constituted in this way only endures as

long as the party is within Scotland ; whenever he leaves it, a domicile, constituted by forty days' residence, comes to an end, and no citation afterwards left for him could be sustained. This seems to be indisputable in the case of a foreigner ; and from the reversal of *Pedie v. Grant*, 14 Juno 1822, i. S. 495, (N. E. 460), (in House of Lords, 5 July 1825, i. W. and S. 716), native Scotsmen, domiciled abroad, must be held to be in a similar situation. The act 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 53, seems to relate to persons who have had a true domicile in Scotland, and then, after they have been absent from it forty days, without leaving a family or servants, or leaving notice where they may be found in Scotland, they may be cited as furth of the kingdom.

The domicile must be a proper dwelling-house, and no place of business, however near, if not actually the dwelling-place of the party, can be viewed in the same light. Thus it was expressly found, that execution at the party's shop could not be sustained, *Anderson v. Anderson's Tenants*, 1 Feb. 1684, M. 3695 ; nor an execution at a merchant's counting-house, *Fraser, &c. v. Lancaster*, 14 Jan. 1795, M. 3706 ; *Sharp, Fairlie, and Co. v. Garden*, (*M' Lane's Trustee*), 21 Feb. 1822, i. S. 337, (N. E. 314) ; nor at a writing chamber, not contiguous to the defender's house ; *Nisbet v. M'Lelland, &c.*, Jan. 1686, M. 3696.

It will, however, be kept in view, that the counting-house, or place of business, is the proper place for citing a company itself, as a company ; for the fictitious person thereby created possesses a domicile and a forum exactly as an individual, and these are where the business is carried on, *Ainslie v. His Crers.*, 7 July 1831, ix. S. 901 ; but whenever it is wished to cite the partners, it must be done either personally or at their dwelling-places ; and a citation given to one partner is not enough to sustain a decree against another, though the



partner cited may have appeared, and given in defences for himself and the other partner, without authority; *Wordie v. M' Donald*, 15 Dec. 1831, x. S. 142.

SECT. V.—MODE OF EXECUTION AGAINST INCORPORATIONS,  
OFFICERS OF STATE, &c.

An incorporation may be cited, when the office-bearers or representatives are met together, by delivery of a copy to the Preses, for himself and the other representatives, or by citing each of the representatives personally, at his dwelling-place, or edictally in common form; *Dalrymple v. Bertram*, 23 June 1762, M. 752. The representatives are pointed out in the charter of erection; and when a corporation is authorized to sue and defend, by a more descriptive designation, as "governor and company," it may be cited in the same way; *Murray v. York Buildings Co.*, Jan. 1733, M. 3780. In actions against a Burgh, it is usual to raise the action against "the Provost, magistrates, and town-council," without specifying the names, to prevent any difficulty arising from the death of any of the members; *Lockhart v. Magistrates of Lanerk*, July 1752, M. 11993; but if not cited as a body, when met together, the execution against the members must, of course, specify the names and designations of the members in common form, vi. Bell's Styles, 10. The same rule applies to collective bodies in general, such as professors of universities, synods, presbyteries, &c. It is incompetent to cite the office-bearers, by leaving copies for them at the place where they meet to transact business, when they are not there themselves; *Dalrymple*, *supra*.

In actions against the Officers of State, whose names need not be mentioned in the summons, (*Lockhart*, *supra*), they are to be cited by an edictal execution, at the office of the Keeper of Edictal Citations, (*supra*, p. 117) 'and also by

leaving a full or short copy, as the case may require, of the summons, on a desk in the Exchequer Chambers. The Commissioners of Woods and Forests are cited by service on the Lord Advocate as representing them, and intimation made of such service to the first Commissioner, by letter sent through the post-office; 3 and 4 Wm. IV. c. 69, (28 Aug. 1833), § 22. See, as to citation of joint stock and mercantile companies, *supra*, p. 239, and P. ii. 1. 8-14-15.

SECT. VI.—MODE OF GIVING CITATION AT DWELLING-PLACE.

Let us now consider the manner in which the citation at the dwelling-house is to be given. This is regulated by the act 1540, c. 75, (c. 10, Th. Ed. ii. 359), and as those regulations have been explained by practice, the messenger delivers the copy to the defender's servant or wife; but it is not now considered necessary to shew the principal writ, as required by the act. An execution of a summons was sustained which bore that the messenger, not having personally found the defender, had left a copy for him in the hands of a woman within his dwelling-place, although it did not specify her to be either his wife, daughter, or servant; A. B. (*Lord Kintore v. Low's Trs.*), 28 Jan. 1834, xii. S. 347; ix. F. 209. The delivery of the copy must be at the defender's dwelling-place, and not elsewhere, *Countess of Cassils v. E. of Roxburgh*, 11 Dec. 1679, M. 3695; iii. Sup. 315; *Nisbet v. His Factor and Curators*, 30 July 1736, Elch., Execution, No. 2. If the servant will not receive the copy, it is then to be affixed on the most patent door of the house. If no entry to the house can be got, then the messenger affixes the copy on the door, after giving six knocks. An arrestment was in one case found null, though the copy was delivered to the party's wife in his dwelling house, because no knocks had been given, *Paterson v. Jardine*, 1682 and 1683, iiii Sup. 462; but this decision is evidently at

variance with the express words of the act, and with the reason of the thing ; as the only use of the knocks is to call the attention of the inmates of the house, which is unnecessary, where the copy is delivered to the defender's wife or servant. The objection was therefore repelled, *Countess of Cassils*, supra ; and the same decision was given in another case, *Biggar v. Wallaces*, 17 July 1702, M. 3775. An execution of arrestment was held inept, where the service copy was folded up like a letter, and left at the door with a servant, no enquiry being made to ascertain if the master could be seen personally, and the execution bore that a copy was left with a servant, as the party could not be personally found—it being proved in an improbation, that the witnesses did not know what was in the letter,—that the master was at home the whole day, and could have been seen, and that he never received the service copy ; *Munro and Grant v. M'Tier*, 1840, Lord Ivory, (not reported). The want of the six knocks, where admittance is not obtained, is held a nullity in an execution of an inhibition ; and the same rule would probably be followed as to a summons ; for a neglect of the regulations of the act 1540, though it renders the messengers liable to be punished, has also been found to infer a nullity in the execution ; *Duff v. Gordon*, 12 June 1707, M. 3775, and many other cases ; but see *Holmes v. Reid*, 4 Mar. 1829, vii. S. 535.

When a Summons is against a husband and a wife, both ought to receive copies, though, where the execution is at the dwelling-place, one copy delivered to the husband for himself and his wife, may perhaps be sustained ; but if he be not at the dwelling-place, when the copy is delivered, the execution will not be sustained ; *Keir v. Robertson*, 10 July 1702, M. 3757, *E. of Galloway v. Hamiltons*, 30 June 1700, M. 3759. A copy given to a curator, for behoof of a minor, would be equally ineffectual ; last case. See *supra* P. ii. 1. 3.

## SECT. VII.—EDICTAL CITATION.

Edictal citations as against persons furth of Scotland, "were introduced by custom, but at what time is uncertain." Tait's MS. "Preliminarys of Proces." This form of procedure is considered as rather an extraordinary species of citation, and was peculiar to the Court of Session, the Admiralty, and the Commissary Court. In the case, therefore, of diligence of all kinds, the warrant to cite edictally must be specially applied for, by bill to the Lord Ordinary in the bill chamber; but such a warrant is inserted in summonses without any authority, even in adjudications, which are in reality a species of diligence, *Lord Braco v. Brodie*, 22 July 1747, M. 3690. As a messenger can do nothing without a warrant, it would appear that an edictal citation, for which there was no authority in the summons, would not be sustained, as has been found in the case of an arrestment, *Monteith v. Murray*, 18 July 1677, M. 3685; and of incident diligence, *Muir v. His Tenants*, 28 Feb. 1629, M. 3684.

The places at which edictal citations were formerly executed, were the market cross of Edinburgh, and pier and shore of Leith. The form of edictal citation was as follows:—The messenger, with a witness, went to the market cross, &c.; after crying three several oyeses, he read the summons or warrant; and he affixed a copy of the summons, and short copy of citation, (or the latter alone, in cases where the writ did not require a full copy for execution), to the market cross. It is, however, believed, that in practice messengers seldom went to the market cross at all, but were in use to return an execution without leaving their own offices. By 6 Geo. IV. c. 120, § 51, (*infra*, p. 251), all citations against persons *furth of Scotland*, were ordered to be given at the Record Office of the Keeper of the records of the Court of Session, in the Register House; and certain regulations were made

for recording and printing a list of them. By § 7 of A. S. 24 Dec. 1838, (*Form of Extracts, &c.*), it is ordered that all such citations shall be made at the office of the Keeper of edictal citations, and the printing and distribution of the lists of such citations, &c. are regulated by A. S., 24 Dec. 1838, (*Enrolment of new causes, &c.*), § 14, and A. S. 4 June 1841.<sup>1</sup> See *supra* p. 116, *et seq.*

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<sup>1</sup> Edictal citations are accordingly made at an office established for the purpose in the Register House, kept by the Keeper of the minute book, the copies of citation and writings being left for that purpose in a box placed for receiving them in the lobby of the Register House.

By the act of Parliament to amend the law and practice in regard to the services of heirs, 10 and 11 Vict. c. 47, (25 June 1847), abstracts of petitions for the service of heirs, are appointed to be left at the office of the Keeper of the register of edictal citations, and such abstracts are to be printed and published by him as part of the edictal citations. By Act of Sederunt, 14 July 1847, § 2, such publication is directed to be made weekly, although the other edictal citations are published only once in fourteen days. A record of those abstracts of petitions for service is also appointed to be kept in a separate book. These registers are kept in the following form:—

No. 580.

#### EDICTAL CITATIONS.

COURT OF SESSION,

(SERVED.)

14th January 1848.

126. SUM. OF CONSTIT.—Miss Margaret Gray Hamilton, residing at Bothwell Park, second daughter of, and general disponent and sole accepting trustee nominated, as mentioned in said summons, by the now deceased Mrs. Ann Hamilton of Bothwell Park, her mother, widow of Alexander Gray, late attorney-general at Quebec, and daughter of the late William Hamilton of Bothwell Park (in virtue of whose settlement, and as therein required, she, the said Mrs. Ann Hamilton, resumed the name of Hamilton), AG William Hamilton Edington, presently in Australia, or else—

By the said act of 6 Geo. IV. § 53, it is provided, that where  
 “a person not having a dwelling house in Scotland, occupied by

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where furth of Scotland, eldest son of the deceased Mrs. Ann Gray or Edington, eldest daughter of the said deceased Mrs. Ann Hamilton, and wife of the late Thomas Edington of the Phoenix Ironworks, Glasgow.—Appearance sixty days. Hunter, Blair, & Cowan, A.

15th January 1848.

127. SUM. OF DECLAR.—William James John Alexander Sinclair of Freswick, AG Mrs. Barbara Sinclair or Thomson, wife of William Thomson, Assistant Commissary-General of the Forces, London, sister of the pursuer, and daughter of the late William Sinclair of Freswick, and her said husband for his interest, as being furth of Scotland.—Appearance sixty days. A Snody, A.

26 January 1848.

140. SUM. OF RED. AND COUNT. AND RECK.—James Innes, shoemaker in Fife-Keith, in the county of Banff, second son procreated of the marriage between the deceased James Innes, feuar in Fife-Keith, in the said county, and Mrs. Jane George or Innes, his wife, an executor *qua* one of the nearest in kin, of the said deceased Mrs. Jane George or Innes, his mother, and one of the younger children of the said deceased James Innes, AG William Innes, now a private or corporal in Her Majesty's 92d Regiment of Foot, presently stationed at Limerick, or elsewhere in Ireland.—Appearance sixty days. Ja. L. Hill, A.

## INFERIOR COURTS.

24th January 1848.

5. SUPPL. SUM. OF REMOVING.—Walter Francis Duke of Buccleuch and Queensberry, AG Margaret Nicol or Palmer, residing at Bailey-head, near Roansgreen, in the county of Cumberland, sister of the deceased William Nicol, who was tenant of the lands and farms of Caulfield and Earshaws, lying in the parish of Langholm, and county of Dumfries, and spouse of George Palmer, residing at Bailey-head aforesaid, near Roansgreen, in the county of Cumberland, and the said George Palmer for his interest.—Appearance sixty days. Sheriff Court, Dumfries. John Gibson, junior, A.

## ABSTRACT OF PETITIONS FOR SERVICES OF HEIRS.

282. PETITION FOR GENERAL SERVICE TO THE SHERIFF OF LANARK.

his family or servants, shall have left his usual residence, and have been therefrom absent during the space of forty days, without leaving notice where he is to be found within Scotland, he shall be held as absent from Scotland," and cited edictally. It was formerly found, that if a party is within Scotland, no edictal citation can be sustained, though he may

shire, by Mrs. Margaret Binnie or Wilkie, spouse of David Wilkie, writer in Glasgow, Mrs. Mary Binnie or Gilmour, spouse of Robert Gilmour, timber merchant in Glasgow, Mrs. Agnes Binnie or Craig, spouse of James Craig, boot-maker and leather-merchant in Glasgow, Mrs. Isabella Binnie or Anderson, spouse of the Rev. William Anderson, minister of the Relief Congregation in John Street, Glasgow, and Mrs. Rebecca Binnie or Wilkie, spouse of John Wilkie, writer in Glasgow, and their said husbands for their interest—said females being the only children and nearest and lawful heirs-portioners of the deceased John Binnie, Esquire, of Hangingshaw, whose ordinary or principal domicile, at the period of his death, was in the said county of Lanark. Presented on the 20th January 1848. Mitchell, Henderson, and Mitchell, writers, Glasgow, Agents.

283. PETITION FOR SPECIAL AND GENERAL SERVICE TO THE SHERIFF OF LANARKSHIRE, by Allan Mason, farmer, residing at Redcothill, in the parish of Cambuslang, and shire of Lanark, as eldest son and nearest and lawful heir in special and in general to the deceased James Mason, farmer, lately residing at Redcothill, in the said parish of Cambuslang, and shire of Lanark, in special, in all and haill these two roods of lands or thereby, part of the estate of Westburn and Gilbertfield: *Item*, All and Haill these eighteen falls of ground or thereabouts, being part of the march lands of Cambuslang, commonly called Chapel, with the house, biggans, and pertinents: *Item*, All and Whole that piece of land, containing twenty falls or thereby, being lot number twenty, laid off for building a New Town called Chapbeltown, all situate in the county of Lanark. Presented on the 20th January 1848. George Smith, Agent.

285. PETITION FOR GENERAL SERVICE TO THE SHERIFF OF CHANCERY, by John Minet Fector, of Dover, Esquire, as nephew and lawful heir of provision in general to the deceased Admiral Sir Robert Laurie of Maxwelltown, Baronet, Knight Commander of the Bath, whose ordinary or principal domicile, at the period of his death, was in the county of Dumfries. Presented on the 22d January 1848. R. and J. O. Mackenzie, W.S. Agents.

have only returned for a few days, after an absence of some years; *Little v. Crera. of Tundergarth*, 26 Jan. 1783, M. 3700; — *v. Lord Cardross*, 8 Dec. 1680, ii. Sup. 261. But if the defender have done any thing to make the creditor believe he was furth of Scotland, he cannot state the objection; *Sandbach and Co. v. Caldwell*, 12 Nov. 1825, iv. S. 171, (N. E. 173). This case was referred to as a very special one in *Robertson v. M'Culloch, &c.*, 10 June 1836, xiv. S. 950, where a defender residing in Glasgow, having been cited edictally, as furth of the country, the defence of no process was sustained, although his father and brother, who were also defenders, had refused to inform the pursuers where he was to be found. It will also be kept in view, that the above enactments relate solely to citations, &c. against persons furth of Scotland; and therefore, in the case of a ranking and sale, &c. where there is an edictal citation to all and sundry, or to the lieges, the summons must be executed in the old form, at the Market Cross, Pier and Shore, as well as at the Record Office; for the lieges do not come under the description of persons furth of Scotland. See *infra*, P. v. 8. 2. See the special case of *Ferrier v. Ross, &c.*, 7 Mar. 1833, xi. S. 531, where the husband of a defender in a ranking and sale was found to be effectually cited for his interest, by an edictal citation, his wife and family being abroad, though he alleged that he was resident in Edinburgh at the date of citation.

In former times, when the country was in a disturbed state, the court were occasionally in the practice, on an application to them by petition, to allow citations to be given, or arrestments used, at the Market Cross of the Royal Burgh nearest to the place of the defender's or arrestee's residence, when it was impossible to execute the writ in the common way. This was allowed in the Rebellion of 1715, against certain persons who had joined the rebels, or resided in parts of the country in their possession, *Ashurt*



and *Factor Supplts.*, 2 Dec. 1715, M. 3709. It has also been allowed where a facile person had been improperly carried off, the object of the citation being to get him interdicted, *Cockburn v. Robertson*, 7 July 1697, M. 3708; and likewise, where one had purposely absconded, *Cochran and Dykes v. Urquhart*, 12 June 1705, M. 3686; iv. Sup. 611. The court would probably still interfere, were a strong case of necessity satisfactorily made out. A special application would, however, require to be made to the court, as the Lord Ordinary in the bill chamber has no authority to exercise such a power, *M'Pherson v. M'Laud*, 29 June 1666, M. 3685, (see *supra* p. 44). Vagabonds also, having no fixed place of abode, were sometimes cited edictally in our early practice, at the head burgh of the shire where they most commonly haunted, *Home v. Libberton*, 22 Feb. 1491, Balf. 312, M. 3707. A party with no fixed domicile, but exercising a profession, in following which, he is in use to travel constantly throughout the country, passing from one jurisdiction to another, is liable to be convened in that jurisdiction where he is personally cited, *M'Niven v. M'Kinnon*, 14 Feb. 1834, xii. S. 453.

#### SECT. VIII.—REQUISITES OF CITATION GIVEN TO PARTY.

The copies of citation delivered to the party must "bear at length, and not in figures, the day and date of the delivery thereof, as also the names and designations of the witnesses, in such sort as the execution and indorsation did and doth bear the same;" 1693, c. 12, (c. 21, Th. Ed. ix. 271). The sanction of this act is, that the messenger shall be deprived of his office if he neglect its regulations; but it was found to infer a nullity of the execution in one case, *Stewart, &c. v. Brown*, 22 May 1824, iii. S. 56, (N. E. 36). This decision is, however, overturned by a later case, *Holmes or Shiells and Husband v. Reid*, 4 Mar. 1829, vii. S. 535, where all the judges were consulted; and it was found that the omission to

insert in the copy of the citation the names and designations of the witnesses, was not a nullity. In the form of the copy of citation appended to the act of sederunt, 8 July 1831, the names and designations of the witnesses are inserted, so that the omission will now probably be held a nullity. That act of sederunt, (§ 1), farther requires, that the messenger cite the defender to appear in court on the last day of the legal *inducia*, applicable to the case, the *inducia* in all cases running from the date of citation. The defender is not therefore now to be cited to a particular day, but to the sixth, twenty-seventh, fortieth, or sixtieth day after citation, as the case may require.

It has sometimes been maintained that the citation left with the party, should be signed by the witnesses. This mistake has arisen from the act 1686, c. 4, (c. 5, Th. Ed. viii. 586), requiring " citations " to be signed by the executor and witnesses ; but it is obvious, both from the title and the body of this act, that by " citation " is here understood the execution or indorsation by the messenger. It has never been the practice for witnesses to sign the citations given to the party, and the objection was repelled, *Beattie v. Lee*, 14 Feb. 1823, ii. S. 220, (N. E. 194). See also *Connel, Wright. and Co. v. Fairlie, &c.*, 31 Jan. 1824, ii. S. 664, (N. E. 558). It must, however, be signed by the messenger ; 1592, c. 141, (c. 59, Th. Ed. iii. 573) ; Stair, iv. 38. 15. Where the copy citation was duly signed by the messenger, the court held that it was not necessary that the copy summons served should also be signed, *Izatt v. Robertson* or *Kennedy*, 25 Jan. 1840, ii. D. 476.

#### SECT. IX.—SUMMONS FALLS IF NOT EXECUTED.

It was formerly held, that the summons must be executed within a year and day of its date, *Rew. v. Viscount Stormont*, 22 July 1665, M. 11,972 ; and that the day of compareance must also be within year and day of the date, *Brown and*

*Curators v. Carstairs*, 3 July 1711, M. 11,983; but the rule of the act of sederunt, 8 July 1831, (§ 3), is, that the instance shall fall unless the summons be executed within year and day of the signeting, and be called within year and day of the day of compearance; and the said section farther declares, that when the last day of the legal *induciæ* of any summons, suspension, advocacion, or other writ, shall not be a sederunt day, the day of compearance shall be held to be the first sederunt day thereafter. If any blunder be made in the execution of a summons, it may be executed *de novo*; *Butter v. M'Donalds*, 7 Aug. 1769, M. 11,999.

It is not a good objection to the citation in a summons of ranking and sale, that the names of the creditors were blank when the summons was called, as it is usual in such summonses to fill up the name of the common debtor only, leaving a blank for the names of the creditors. It is immaterial whether the names be ever filled up, as the roll of defenders' names in the process supplies the defect, *Paterson v. Anderson*, 16 Nov. 1764, M. 3691. A laxity in this respect was also extended to summonses of *Cessio*, under the old form of proceeding, *M'Nichol v. His Crers.*, 5 Mar. 1830, viii. S. 644; see *Matheson*, 24 June 1824, iii. S. 166, (N. E. 111).

#### SECT. X.—REQUISITES OF MESSENGER'S EXECUTION.

We proceed now to the Execution of the messenger, or what was formerly called his Indorsation, from being generally written on the back of the writ. It is the certificate by the messenger and witness of the service of the summons on the defender. Where the law has required the execution of a messenger, no other evidence can be received of the service of the writ. Thus, it was found that the want of it could not be supplied by a notarial instrument, *Haswel v. Magistrates of Jedburgh*, 25 June 1714, M. 11733. The execution must, of course, correspond to the form of the Will

of the summons, and the citation to be given in consequence ; A. S. 8 July 1831 ; A. S. 24 Dec. 1838, (*Form of Extracts, &c.*) ; *supra* P. ii. 2. 9.

Let us now consider the requisites of an execution. " The executor's name and designation must be expressed, and the letters, which are his warrant ;" Stair, iv. 38. 13. " All executions of summonses shall bear expressly the names and designations of the parties' pursuers and defenders ; and it shall not be sufficient that the same do relate generally to the summons, otherwise the execution shall not be sustained," 1672, c. 6, *in fin.*, (Th. Ed. viii. 64). Executions have often been found null on this statute, *Lady Kinglassie v. Alexander*, 26 Nov. 1680, M. 3742, ii. Sup. 6 ; iii. Sup. 377 ; *Wallace v. Maxwell*, Feb. 1687, M. 3743, where the want of designation was found a nullity ; *Creightons v. Deans*, 16 Nov. 1832, xi. S. 30, although the date and signing of the summons were specified, and an amended execution was refused to be admitted. " Yet, if the executions be written on the back of the summons, and not in schedules apart, though the execution bear but ' the persons within written ' generally, it may suffice ;" Stair, *ubi supra* ; *Dunbar, &c. v. M'Leod, &c.*, 20 Feb. 1755, M. 3746. The same judgment was given where the execution was stitched in at the end of the summons, *Watt v. M'Intosh*, 10 Feb. 1827, v. S. 334, (N. E. 309) ; but in *Collier v. Paterson*, 3 June 1834, xii. S. 674, this decision was declared erroneous ; *Stewart v. M'Ra*, 13 Jan. 1831, ix. S. 261. See also *Clason v. Campbell, &c.*, 21 Dec. 1837, xvi. S. 289 ; and *Globe Insurance Co. v. Tytler, &c.*, 10 Dec. 1842, v. D. 294 ; A. S. 8 July 1831, schedule v. It is usual in practice in all cases to mention the names of the parties. " Where parties, pursuers or defenders, are so connected, that the process cannot proceed if any one of them is wanting, as, for example, in reductions of elections of burghs, it has been found a nullity in the

execution, that any of the parties' names were omitted to be expressed in it. But that in every case where more parties are called in one summons, the execution should be void for not bearing the names and designations of all the parties, has no foundation in the statute, in practice, or the reason of the thing, which can in no case be more apparent than in that of a common exhibition ;" *Donaldson v. Donaldson*, 29 Nov. 1750, M. 3746. In this case it was found, that if the parties are unconnected, their names, &c. may be contained in different executions, each containing the names and designations of only a part of them ; and Lord Kilkerran, who reports the case, thinks that it ought not to be required that there should be *one* execution bearing the names and designations of all the parties, but that it is sufficient if there be two executions, for example, that one of them contain a portion of the names and designations, and the other the rest ; *Ibid.* See case of *Clason*, *supra*.

The days of compearance were formerly almost always left blank in the summons, but, notwithstanding, it was very common for the messenger to state in his execution, that he had cited the defenders to appear " on the days mentioned in said summons," informing his employer on what day the defender had been cited. Had this day been filled up in the blank, as was originally the practice, the execution would have been unobjectionable ; but when it continues blank, the execution was often found null in the outer-house, *M'Donald v. M'Intosh*, 26 Nov. 1825, iv. S. 228, (N. E. 231). On an inquiry into the practice, however, it was found that executions in this form were good, *Beattie v. Park*, 22 May 1830, viii. S. 784 ; and since no blank is now left in the summonses, the question cannot again arise ; A. S. 8 July 1831.

The Messenger must narrate fully in his execution, how he proceeded in serving the summons, in order that the

judge may determine whether it has been properly done ; and it is not sufficient to state that it has been duly and lawfully gone about, as this would be to make the messenger the judge of his own proceedings. All the essential circumstances before narrated, must therefore be specified in the execution. It must state whether the summons was executed personally at the dwelling-house, or edictally. The dwelling-house must be specified ; but it would appear to be sufficient in the execution of a summons, if it could be made out where the dwelling-house was situated, *Finlay v. Little*, 7 July 1676, M. 6959 ; *Montgomery v. L. Fergus-hill*, 9 Nov. 1632, M. 3749 ; *Crers. of Creighton v. His Majesty's Cash-keeper*, 8 Feb. 1684, M. 3750, Ersk. ii. 5. 55 ; *Scott v. Fisher, &c.*, 2 Dec. 1825, iv. S. 261, (N. E. 266). An execution bearing that a copy was delivered to a party's wife or servant, will not be sustained, unless it bears that it was delivered at his dwelling-house, *Countess of Cassills v. E. of Roxburgh*, 11 Dec. 1679, M. 3695. Neither is it sufficient to state merely that a copy was left at the dwelling-place, *Threapland v. Strachan*, Feb. 1684, M. 3756 ; for it must state distinctly how it was left, *Blair v. Creditors of Mein and Chatto*, 8 July 1697, M. 3757. The delivery of a copy being essential, it is not enough to say that the party was personally apprehended and lawfully warned ; *Sanders v. Jardine*, 23 Nov. 1681, M. 3791. In the case of a diligence, the omission to specify the six knocks or three oyeses, has been held a nullity. Many other decisions will be found in Morison's Dictionary, under the word Execution ; but it seems unnecessary to multiply quotations, as they can be of little use, except where the very same blunders occur, there being no reasoning from one blunder to another. A proper rule would appear to be, that the execution ought to set forth every particular which is essential to the service, under the pain of nullity ; for the law may

presume, that a form has been omitted where it is not stated to have been used ; but this rule has not been observed. Thus, although by the act 1592, c. 141, (c. 59, Th. Ed. iii. 573), it is required that the messenger shall sign the copy left, yet it has been held in two cases, that the omission to state that the copy was signed was no objection to the execution, *Loch v. Home*, 15 Jan. 1706, M. 3759 ; *Baillie v. Nisbets*, 8 July 1713, M. 3745. The date of the execution is an essential part of it ; if it therefore bears date before the summons, the execution is null, *Hamilton and Clunis v. Murray and Company*, 7 Dec. 1830, ix. S. 143 ; although the objection had been disregarded in a previous case, *Rankine v. Corson*, 1 July 1825, iv. S. 127, (N. E. 128). The decision in *Hamilton* was confirmed in a still later case, *Cumming v. Munro*, 19 Nov. 1833, xii. S. 61. The effect of errors in the designations of parties occurring in executions will be found exemplified in *Hunter v. Creightons*, 26 May 1832, x. S. 583 ; *Guthrie v. Munro*, 27 Feb. 1833, xi. S. 465 ; *Scottish Union Insurance Co. v. Calderwood*, 8 Mar. 1836, xiv. S. 667 ; and *Muir v. Hood or Chambers*, 10 July 1845, vii. D. 1009. Such cases are necessarily special, each depending upon its own peculiarities.

Our present practice, at least in the execution of ordinary summonses, is less rigorous, in the exaction of every minute point of form, than our older. The Messengers of former days seem to have been not only an ignorant set, but to have willingly lent themselves to the fraudulent devices of unprincipled employers. It appears ridiculous to insist so pertinaciously, as was done, on the exact six knocks ; but this was a statutory requisite, 1540, c. 75, (c. 10, Th. Ed. ii. 359) ; and it seems to have been not unusual to attempt to obtain decrees and to execute diligence, without the debtor being aware of the proceedings. For this purpose, the copy, instead of being delivered to or left

with a servant, was affixed, or said to be affixed, to the door; and then the messenger, or some of his concurrents, took it away, to prevent it coming to the knowledge of the debtor. The court therefore found, wherever a copy had been so taken away, that the execution was null, *M'Culloch v. Gordon*, 11 Feb. 1674, M. 3755.

During the period, too, when a debtor's single escheat fell by his being denounced rebel for a civil cause, and when the infamous traffic was carried on by those who had influence at court of obtaining gifts of those escheats, (sometimes even before they had fallen by the party's denunciation), the Court of Session very properly set themselves to check such proceedings, by every means in their power, and willingly laid hold of every slip, in point of form, to protect the unfortunate debtor from the rapacity of the favourites of the crown. As large estates also were often carried off for very small sums, by apprisings, the court were equally desirous to lay hold of any inaccuracies which had been made in leading them. But though some slight relaxation may have taken place in the case of ordinary summonses, where no one but the debtor and creditor are concerned, and where sustaining the objection has little other effect than to create delay, there is no reason to suppose that the same remark is applicable either to diligence or to those summonses which are, in reality, of the nature of diligence, as adjudications, rankings, and sale, &c., or where there is a competition of creditors.

With regard to the farther statutory requisites of the execution of summonses, the act 1686, c. 4, (c. 5, Th. Ed. viii. 586), ordains all executions, of whatever kind, to be subscribed by the executor and witnesses, (now one witness, *supra*, p. 233), under pain of nullity; and an execution was therefore found null, as one of the witnesses had only signed by his initials, *Meek v. Dunlop*, 18 June 1707, M. 16,806;



and the want of the witnesses' subscription is plainly a nullity, *Moir and Morison v. Dons*, 24 Jan. 1711, M. 16,893; *Orrock v. Peter*, 1769, v. Sup. 435; *Baillie v. Doig*, 2 Mar. 1790, M. 11,286; *Henderson v. Thomson*, 22 Nov. 1828, vii. S. 51. But it is incompetent in a suspension of a decree *in foro* of an inferior court, to object, for the first time, that the execution of citation was not signed before witnesses, *Limond v. Reid*, 22 Dec. 1821, i. S. 232, (N. E. 220). An execution not signed by the messenger, or with his initials only, would, *a fortiori*, be null; *Irvine v. —*, 27 Feb. 1739, M. 16,810; see also M. 3777, 3778, 3779, &c.

Where an execution consists of several pages, it ought to be signed by the messenger and witness on each page, as the witness does not attest merely the messenger's subscription, but what is set forth in the execution. It would rather appear, however, from the analogy of private writs and sasines, that if an execution, written on one sheet, was signed by the messenger and witness on the last page only, it would be sufficient, *Williamson v. Williamson*, 21 Dec. 1742, M. 16,955, and 16,933; *D. of Hamilton v. Douglas*, 9 Dec. 1762, M. 16,956; *Smith, &c. v. Bank of Scotland*, 4 July 1816, F. C.; and, if it consists of several sheets, it is not requisite to sign more than each leaf, and the last page, as has been found both in private writs and sasines, and also in a messenger's execution; *Peter v. Ross, &c.*, 19 Feb. 1795, M. 16,957.

The name and designation of the writer of the execution has never, in practice, been inserted; nor is it necessary in the execution of any *summons*, unless it is intended to interrupt prescription in real rights, that the designation of the witness should be inserted in it. The act 1681, c. 5, (Th. Ed. viii. 242), limits this requisite to inhibitions, interdictions, hornings, arrestments, when executed by messengers, and where the execution of a summons is required to interrupt

the above prescription. The want of the designation of the witness is therefore no objection to the execution of a common summons; *Napier v. Lord Elphinston*, 8 Dec. 1736, M. 16,899. But it will be kept in view, as already mentioned, that the citation given to the party must, it would appear, in all cases, have the names and designations of the witnesses, by the act 1693, c. 12, (c. 21, Th. E. ix. 271). See Sect. viii. *supra*.

Where the law has made the attestation of a public officer an essential part of the constitution of a right, as in the case of a notarial instrument, or a messenger's execution, the instrument or execution forms evidence so strong of the facts therein set forth, that it cannot be overruled or redargued, otherwise than by proof of falsehood, Ersk. iv. 21. 5; and therefore, where an execution bears that a just copy was delivered, the defender is not entitled to get the process dismissed, by production of the copy citation served on him by the messenger, and which turns out to be disconform to the execution, because, "in competition between the copy and the execution of the summons, the execution or summons will prevail."—Tait's MS., "Preliminarys of Proces," and the latter must bear faith until it is improven; *M'Donald v. M'Leod*, 11 Jan. 1726, M. 3765. See also various cases in M. *voce* Competent, p. 2708, 9, 13, 14, 18, 21. Also *Dun v. Craig*, 11 Mar. 1824, ii. S. 797, (N. E. 658); *Calder v. Calder*, 20 Dec. 1825, iv. S. 331, (N. E. 336); *Ramsay v. Pettigrew*, 13 Dec. 1828, vii. S. 193. But in *Fraser v. Fraser*, 26 Feb. 1825, iii. S. 590, (N. E. 405); and *Dunlop v. Nicolson*, 10 July 1827, v. S. 915, (N. E. 850), the objection was received *ope exceptionis*. The latter of these cases, however, was treated as one of a special nature, and as not affecting the general rule, that a formal execution cannot be contradicted by the service copy, *Macqueen v. Clyne's Trs.*, 20 May 1834, xii. S. 610. See various cases to the same effect, S. Dig. *voce* Process, No. 223, and references as com-

pared with the later decisions in *M'Donald v. Sinclair*, 21 June 1843, v. D. 1253, and *Allardice v. Blakey*, 12 Jan. 1847, ix. D. 314. A reduction was held necessary where it was objected to a notarial protest, that it bore to have been served at a certain house, as the debtor's dwelling-place, which, in point of fact, was not so, *Telfer v. Barrow and Cooper*, 30 Nov. 1844, vii. D. 170. As pleas are receivable in competitions, by way of exception, which otherwise could only be received in the form of a reduction, a plea founded on the disconformity of the service copy will also be received in such cases; *Stewart, &c. v. Brown*, 22 May 1824, iii. S. 56, (N. E. 36); *Holmes or Shiels v. Reid*, 4 Mar. 1829, vii. S. 535, Lord Mackenzie's speech, 541; M. 2750, &c.; see *infra*, P. iv. 6. 9.

Improbation of the execution must, however, be proponed *in initio litis*, otherwise it will not be received; *Elections of Wick*, Mar. 1773, v. Sup. 457; and an objection *ex facie* of the execution will not be listened to after *litiscontestation*; *Limond v. Reid*, 22 Dec. 1821, i. S. 232, (N. E. 220). But in an older case, *M'Laughlans v. M'Dougal*, 27 Dec. 1744, M. 6783, improbation of the execution was received after peremptory defences, and a decree by the Lord Ordinary against the defender. Where the execution of a messenger is objected to on *ex facie* errors, and there is no averment of fraud, an action of simple reduction is sufficient; *M'Lellan v. Graham*, 30 June 1841, xvi. F. 1209; but where falsehood is alleged, an action of reduction-improbation is necessary, and it is not essential that the officer be made a party to the action, *M'Vitie v. Barbour*, 22 June 1838, xvi. S. 1185; *Balfour v. Robertson*, 2 Feb. 1839, i. D. 458. See *infra*, P. iii. 2. 2.

An action of reduction would appear to be equally necessary, where the objection to the execution is, that the executor is not a messenger. See analogous case of a notary, *Lo. Johnston v. E. of Queensberry*, 26 June 1634, M. 2718,

Ersk. iv. 2. 6.<sup>1</sup> In the reduction, it will be a sufficient defence, that the executor was habit and repute a messenger, though he may have been deprived of his office, Ersk. i. 4. 33. and iv. 2. 6; Stair, iv. 42. 12; *Stuart v. Hay*, 10 Nov. 1676, M. 3092; *Lermont v. Heirs of Lermont and Gordon*, 11 July 1699, M. 3096; but after the deprivation is published in the newspapers, all executions by him are null: *Hunter v. Montgomery*, 18 Feb. 1732, M. 3097.

In a simple reduction of a decree of suspension, the party who had, as messenger, signed the execution of intimation of sist, but was subsequently deprived of his office, was allowed to be called as a witness to disprove his own execution; but it was observed that his evidence required to be scrupulously considered, *Aitchison v. Patrick*, 28 Dec. 1836, xv. S. 360: see *Rankine v. Lang and Co.*, 7 Dec. 1843, vi. D. 183.

#### SECT. XI.—AMENDMENT OF EXECUTION.

“If upon inspection it shall appear that any mistakes have been committed in writing them (executions) out, these ought to be rectified by the messenger, before the executions are produced in judgment, or the summons may be executed of new, which was found competent, July 1769, *Henry Butter, Factor on Cluny, v. the Tenants*.”—Tait's MS. “Preliminarys of Proces.”

With regard to the amendment of a messenger's execution after being produced in court, Kilk. p. 169, states, that on a verbal report, the Lords agreed that a messenger may amend his execution, where nothing inconsistent with what the execution produced bears, is proposed to be added; but they would not allow him to add two additional witnesses to his execution, p. 170. See M. *voce* Litigious, § ii. 8337, &c. A number of other cases will be found in Morison's Dict.,

<sup>1</sup> Notaries acting without licenses, are subjected in payment of a heavy fine, and declared incapable of performing notarial acts, 39 and 40 Geo. III. c. 72, (9 July 1800), § 7.

in which amendments were allowed. A stricter rule may perhaps, however, apply to diligence, at least in competitions; *Hog v. Maclellan and Lowden*, 2 June 1797, M. 8346. But where there was no competition, an amended execution of arrestment not inconsistent with the fact, was admitted, *May v. Malcolm*, 7 June 1825, iv. S. 76, (N. E. 79), and two of the judges thought that even in a competition, the amended execution might have been received. *Cullen's Trs. &c. v. Watson*, 2 July 1825, iv. S. 133, (N. E. 135). See also *Cameron v. M'Ewen*, 4 Feb. 1830, viii. S. 440.

#### SECT. XII.—EXECUTION IN NIGHT TIME.

It is no objection that a summons is executed, personally or at the dwelling-place, in the night time, for hornings and arrestments may be so executed, M. 3738, 41, &c.; but as the object of an edictal citation at the market cross is to acquaint the lieges, it is improper that such an execution should be made at night.

An execution of a summons on a Sunday is null, as no *actus legitimus* can take place on that day, though it appears to be no objection to a private deed that it is signed on Sunday; see M. *voce* Sunday, 15001, &c.

#### SECT. XIII.—IRREGULARITIES IN EXECUTION.

It was at one time usual for messengers and witnesses to sign their names at the foot of a sheet of paper, and to return it in this state, with a note, containing a few particulars of the execution, to the agent, who wrote an execution above the signatures. This, of course, was no execution at all, and the messenger and witnesses certified nothing; but when the objection was taken, the court refused to sustain it, owing to the *communis error*, and the consequences that might ensue, but they made an act of sederunt, 28 June 1704, prohibiting the practice in future; see, as to its construction, v. Sup. 435, *Falconers v. Smith*, 5 Mar. 1777. A messenger who

had acted in this way, and got two persons to sign as witnesses, who had not seen the writ executed, was deprived of his office; and a writer, who had filled up the execution on the sheet of paper, was fined, and found liable in damages and expenses; *Wilson and Philips*, 12 July 1740, A. S. 358. It is believed that witnesses occasionally sign messengers' executions, without seeing the citation given. This, however, is a dangerous practice, and instances have occurred of persons being put in the pillory for doing so; *James Wright*, 19 July 1788, A. S. 630, see *supra*, p. 39. In *Jack and H. M. Advocate v. Pearson*, 11 Feb. 1824, ii. S. 691, (N. E. 581), the court was of opinion that, although a party may obtain from a messenger who is possessed of proper materials, an execution of a charge actually given, at a distant period, yet, in the circumstances there occurring, the conduct of the party was culpable. The case was remitted from the House of Lords on a different point, 28 June 1825, i. W. and S. 577. A summons signeted against a party but not executed, cannot on his death be altered so as to warrant citation of his representatives, *Tod and Wright v. Boyd*, 29 Nov. 1822, ii. S. 51, (N. E. 45.)

#### SECT. XIV.—DISPENSING WITH EXECUTION.

When the defender is willing to accommodate the pursuer, the expense of executing the summons is sometimes saved, by the defender or his agent agreeing to hold the summons as executed, and the *induciae* may also be dispensed with. A written consent should, however, be annexed to the summons, for otherwise the decree obtained may be held null, if the dispensation with the execution cannot be clearly established, *Cullen, &c. v. Campbell*, 8 Dec. 1829, viii. S. 197. Where the agent for the defender agrees to hold the summons as executed, and gives the messenger a letter to that effect, personal execution is sometimes returned by the latter *against the party*. But, whatever may be done in personal actions,

where no one but the defender has any interest, no such expedients should be resorted to in real actions; and the Court have expressly held, that the real creditors in possession could not supply the want of a citation in a ranking and sale, by sisting themselves, *Littlejohn v. Hamilton*, 7 Mar. 1829, vii. S. 563.

The respondent's agent in an advocacy, having agreed to hold the letters executed, or else to proceed by protestation, and not having done so, and the letters having been executed, the respondent was not allowed to object to an irregularity in the citation, *Wilson v. Pattie*, 27 May 1826, iv. S. 623, (N. E. 631.) A party was held barred from objecting to the regularity of a citation, by having written to the messenger acknowledging that he had duly received it, *Fraser v. Reid*, 29 June 1826, iv. S. 773, (N. E. 781.) If the execution of a summons is to be dispensed with, this ought if possible to be by a writing under the Defender's own hand, as the power of an agent, particularly of a country agent, to do so, though occasionally this occurs in practice, may be doubted.<sup>1</sup>

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<sup>1</sup> " May not the defender himself dispense with the *induciae*? He cannot be compelled to do so, but may not he submit? See Balf. p. 295, c. 6. In the Books of Sederunt, 15 Feb. 1560, Hennison and Sinclair appeared before the Lords, and declared, that they were content that all debateable matters betwixt them should be pursued by a simple claim upon three days warning;—accordingly, the Lords proceeded. But, says Lord Pitmedden, I doubt much if this was sustainable, yea to the contrary, though parties would dispense never so much with points of form, the Lords are astricted thereto, and must find sentences null, where these are pretermitted. One thing is clear, that no defender can dispense with form, so as to favour one creditor more than another. If a defender charged on a general charge to enter heir, and cited on a summons on the passive titles, renounces before the forty days are elapsed, so as to bring the summons sooner into court, he ought to renounce in general to all his predecessors and creditors, and not the charger allenarly, and this, if done honestly, and without collusion, may be sustained, Bank. i. p. 269,

## SECT. XV.—INTIMATION OF SUSPENSIONS AND ADVOCATIONS.

Before the great changes introduced by the 1 and 2 Vict. c. 86, (10 Aug. 1838), in the forms of proceeding in advocations and suspensions, the foregoing rules were generally applicable to the execution of the letters, when that was necessary. But subsequently to the A. S. 8 July 1831, execution of letters of suspension and advocacy was seldom required. By the above statute, it is enacted (§ 1), that notes of advocations of final judgments, after being received and marked by the depute clerk, shall be intimated to the opposite party, by delivering a copy to him or his known agent, and a certificate of intimation shall be indorsed on the said note by the agent of the advocator. By §§ 4, 5, and 6, of the same act, the notes of suspension, after being passed by the Lord Ordinary on the bills, are intimated to the opposite party by the note and interlocutor passing the same, being served on him by the messenger at arms, in common form. The relative act of sederunt, 24 Dec. 1838, (*Proceedings in Bill Chamber*), enacts, § 1, "with the view of providing for the proper intimation of notes of advocacy and suspension presented in the bill chamber in future, the agent for the complainer shall bring along with the note at the time he first presents the same, a copy thereof, (which copy, unless the complainer think it necessary, need not contain the annexed reasons or state of facts and pleas in law), and the clerk shall certify the presenting, sisting, or passing of the note, by a certificate annexed to the said copy thus prepared for service."

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§ 105; Stair, p. 485, (iii. 5. 22); Sir E. Tyson, Merchant in London *against* Alex. Cunningham, Tr. for the daughters of Geo. Dunbar, July 1771, (*M. voce* Adjud. Apx. No. 5). But except in very special cases, the general rule ought to be observed, and public forms ought not to be dispensed with, either by judges or parties." Tait's MS., "Preliminary of Proces."



Where the Lord Ordinary had ordered intimation of a note of suspension and interdict, intimation of the deliverance merely, without the note, was held defective, *Duff v. Mailler*, 28 Jan. 1843, S. Jur. xv. 231. A full copy is served in suspensions and liberations, A. S. 21 July 1675.

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## CHAPTER IV.

### OF THE CALLING, AND OF PROTESTATION.

#### A.—OF THE CALLING.

THE summons being duly libelled and signeted, (or if consistorial, signed by a clerk of court), became the ground for arrestment, in virtue of 54 Geo. III. c. 137, (25 July 1814), § 2, provided it was executed "without undue delay," which was fixed to mean, within forty days of the arrestment; A. S. 8 July 1831, § 6. By 1 and 2 Vict. c. 114, (16 Aug. 1838), §§ 16, 17, a warrant of arrestment may now be added to summonses concluding for payment of money, on which effectual arrestment on the dependence may proceed, provided the defender shall be cited within twenty days of the date of the execution of the arrestment, and the summons be called within twenty days after the diet of compareance, or if it fall in vacation, or previous to the first calling day in the next session, provided the summons be called the first calling day thereafter.<sup>1</sup>

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<sup>1</sup> The Lord Ordinary may now, on petition, recall or restrict arrestments used in any action coming before him, on caution, or without it, as may appear just. The Lord Ordinary on the Bills has the same powers in vacation. Any reclaiming note against their judgments must be lodged within ten days, 1 and 2 Vict. c. 114, § 20. The Lord Ordinary on the Bills may exercise these powers, though the case has not been even called, *Morrison v. Rennie*, 23 Nov. 1847, S. Jur. xx. 33.

When the summons is executed, it is then "considered as a begun action," Ersk. iii. 6. 3, and is the warrant of letters of inhibition, as well as of arrestment. If the defender die after execution, the summons does not fall, but may be transferred against his representatives, thus preserving the benefit of all diligence used, *M'Intosh v. Macandrew*, 26 May 1829, vii. S. 649; *Cameron and Mandy. v. Chapman and Mandy.*, 9 Mar. 1838, xvi. S. 907. It would appear to follow, from this case, that the summons would equally subsist were the pursuer to die after the execution, and his representative, upon lodging a minute and his title, ought to be allowed to call the summons in his own name, as representative of the original pursuer. But see the opinions of the judges in *The Lords of the Treasury v. Campbell's Trs.*, 5 Mar. 1836, xiv. S. 657. In *Gallie v. Lockhart*, 24 Jan. 1840, ii. D. 445, it was decided, that after a summons had been raised and executed, but before it was called in court, the pursuer's estates had been sequestrated under the bankrupt act,—it was competent, after the confirmation of the trustee, to call the summons in the name of the trustee. See also case of *Barstow v. Taylor*, there referred to, and *Lords of the Treasury*, *supra*.

SECT. I.—PARTIBUS AND PRODUCTIONS.

We shall now proceed to consider the manner of bringing the Summons, or Note of Suspension, or of Advocation, into court. The first thing to be done is to write on the margin of the first page of the summons, &c., the Partibus, *i. e.* the Division of Court, the names and designations of the parties, and of the pursuer's counsel and agent thus:—"1st (or 2d) Division:—*Call per A. B., Esq., advocate. C. D.—W. S., agent. Summons of Count and Reckoning, E. F. merchant in G. against G. H. Broker in P.*" It is necessary that the

names of the agents for the parties be marked in the *partibus* ; A. S. 10 Mar. 1772, *in fin.*

“ Along with the summons, advocation, or suspension, there shall be lodged an inventory of the process, and also a copy, in plain legible writing, of the *partibus* as written on the summons or letters, which *partibus* shall contain the name and designation of the pursuer, advocator, or suspender, or of each pursuer, advocator, or suspender, if there be only two, or if more, the name and designation of the party first named, with the words, ‘ and others ;’ and if the defenders, respondents, or chargers are not more than three, their names and designations, one or more, shall be inserted in the *partibus*, but, if more than three, the *partibus* shall contain the name and designation of the party first named, with the words, ‘ and others, as per roll,’ referring to a separate roll of all the defenders, respondents, or chargers ; which roll, together with a copy thereof, shall, at the same time, be lodged with the clerk ;” A. S. 11 July 1828, § 27. This roll is identified by the official mark of the clerk, (*supra*, p. 109). As the principal summons, or other writ by which a process commences, is not now allowed to be borrowed up, except in particular cases, a copy of the summons, or of the letters of suspension or advocation, either printed or in manuscript, certified as correct by the agent giving it in, should be lodged along with the principal, in order to be lent up when required, *Ibid.* § 104.

SECT. II.—PRODUCTIONS, WITH SUSPENSIONS AND  
ADVOCATIONS,—&c.

The A. S. 11 July 1828, § 24, declared, that “ before letters of suspension or advocation, complaining of a judgment in an inferior court, are lodged with the clerk for the purpose of being called, or at the time of such lodgment,

the complainer shall lodge with him the process in the inferior court, with an inventory thereof; or if production thereof shall have already been made in the Bill Chamber, the same shall, before the time foresaid, and on requisition to that effect by the raiser of the letters, be transmitted by the clerk of the bills to the office of the depute clerk of session named by the complainer. And the clerk of the bills shall, in like manner, on production of expedite letters, whether of suspension or advocacy, transmit to the office of the said depute clerk of session all writings produced by either party in the Bill Chamber, with an inventory thereof, and shall not deliver up to the parties any such writings, except on application of both parties; or when a certificate of refusal of the bill has been issued; or when a certificate from the signet shall be exhibited, bearing, that the letters have not been expedite during the time allowed for that purpose; or when an extracted protestation, at the respondent's instance, applicable to the case, shall be exhibited to the clerk of the bills; and such transmissions, as well as every other transmission from the clerk of the bills to any of the clerks of session, shall be made in the same manner as is now practised in transmissions from the office of one clerk of session to that of another; the proceedings in every case being accompanied by a complete inventory of the process." Farther, "in every advocacy, where the record has not been made up in the inferior court, and in every suspension, at the lodgment of the letters for calling, reasons of advocacy or suspension shall be lodged therewith, and shall be, so far as depending on matters of fact, stated in an articulate form, with a note of pleas subjoined; and if not so lodged, the letters shall not be called, and all answers to such reasons shall be in a corresponding form;" *Ibid.* § 25.

Under the new system, "when notes of advocacy or suspension have been passed by the Lord Ordinary on the

Bills, such note, along with the answers, if lodged, and productions, shall be transmitted from the bill chamber to the office of the clerk to the process in the outer-house, at any time after the interlocutor passing the bill shall have taken effect, that the party or his agent taking the lead in the process may require; and the agent for the party making the transmission shall furnish the assistant clerk with the proper note necessary to be given to the calling clerk; whereupon the assistant clerk shall get the case printed in the calling list for the week, and be afterwards responsible for the writs transmitted."—A. S. 24 Dec. 1838, § 13.

All notes of advocacy and suspension are on the same footing in respect to calling and enrolling. When fifteen days are elapsed after the date of intimation made to the opposite parties, they may be called, and thereafter enrolled in the same way as letters of suspension and advocacy were under the old system; *Ibid.* § 11. *Infra*, sect. iv.

#### SECT. III.—EFFECTS OF ERRORS IN PARTIBUS.

It is of great consequence that the Partibus be correct; for all the entries in the calling lists, rolls, and minute book, are regulated by it alone, and it is the guide in describing the parties when extract comes to be prepared and issued.<sup>1</sup> Every entry in the minute book (*supra*, p. 115) must contain the names and designations of the parties, A. S. 10 Dec. 1687; and an error in the Partibus may therefore prove of serious consequence; *Allan v. Harrison*, 13 Jan. 1825, iii. S. 429. N. E. 301. Even in proceedings *in foro*, if any error have been made in the Partibus, the decree cannot be extracted until the error is rectified by authority of the court; *McDonnell, Petr.* 21 Jan. 1830, viii. S. 361. And it

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<sup>1</sup> Of course the names of Comparers and Parties who are sisted for their interest, cannot appear in the Partibus.

is a good ground of challenge of a decree in absence, that the Partibus was erroneous at the date of the decree, though it may have been corrected by the clerk before extract; *Allan v. Harrison*, 13 Jan. 1825, iii. S. 429, (N. E. 301). See *Peebles v. Downie and Johnston*, 26. Feb. 1843, v. D. 740.

SECT. IV.—FEE FUND—CALLING DAYS.

Before lodging the summons or note, the fee fund dues must be paid; for until this is done, no paper can be received by a clerk; 50 Geo. III. c. 112, (20 June 1810), § 20.<sup>1</sup> The time of lodging is regulated by the 26th section of the act of sederunt, 11 July 1828:—"Every summons, advocacy, or suspension, in order to be called, shall be lodged with the clerk on or before the third lawful day preceding that on which the calling is to take place. The calling shall take place on the second lawful day before a day for enrolment of causes;" *Ibid.* § 29. During Session each Thursday is a calling day; so that the summons and relative papers must be lodged on Monday; but the last nine days of the winter session, and last seven of the summer session, are also calling days; and during these periods, it is enough to lodge the summons and other writs on the day preceding the calling.

Where the day of compareance in a suspension was Tuesday the 13th, but the calling day was not till Friday the 16th, and a protestation was put by the charger on the 15th, but could not be read in the minute book till the 20th, it was held that the suspension was regularly called, by being entered in the list on the proper calling day, *Fraser v. Fairlie*, 26 June 1823, ii. S. 427, (N. E. 380). There is no alteration

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<sup>1</sup> The dues payable to the Fee Fund are now regulated by 1 and 2 Vict. c. 118. (16 Aug. 1838), § 28, and Schedule.

introduced in the ~~mode~~ of calling advocations and suspensions by the Statute and A. S. of 1838.

In terms of the statute 2 and 3 Vict. c. 36, (29 July 1839), § 13, and relative A. S. 8 Aug. 1839, § 6, 7, *Summonses* may now be called at either of the box days in the autumn vacation, the defences being returned at the second box day, or on the meeting of the court in November respectively.

SECT. V.—REGULATIONS ABOUT PRINTING SUMMONSES, &c.

The regulations regarding the printing of the summons, must also be attended to. "In actions in which no appearance has been entered, or in which defences or answers have not been returned, where this ought to have been done, it shall not, in the first instance, be necessary to print and box the summons or letters for the use of the Lord Ordinary; but, in the event of the defender or respondent afterwards applying to be reponed against a decree in absence, he shall, along with his reclaiming note, lodge with the clerk a printed copy of his defences or answers, (where required), in addition to the process copy thereof; and upon his being reponed, the raiser of the summons or letters shall print the same; and thereafter, at the first enrolling of the cause in the Lord Ordinary's hand roll, there shall be delivered by the party enrolling, to the Lord Ordinary's clerk, for his Lordship's use, a printed copy of the summons or letters, and a copy of the defences or answers, (where required), previously lodged in process;" A. S. 11 July 1828, § 37. But summonses of multiplepoinding, adjudication, constitution, wakening, transference, and *cessio bonorum*, (see *infra*, P. v. 4), and defences therein, do not require to be printed; *Ibid.* § 77; A. S. 7 Feb. 1810, and 11 Mar. 1814.

## SECT. VI.—MODE OF CALLING.

Each of the clerks' assistants in "the outer-house shall, by weekly rotation, take charge of the calling lists; and before ten o'clock in the morning of the second lawful day preceding that on which the calling is to take place, the other clerks shall deliver to the clerk acting for the time, the several copies of partibus aforesaid lodged with them,—those of each office being separately arranged and numbered, together with the copies of the separate rolls lodged with them, as before enjoined; and the said clerk acting for the time, shall cause the whole copies of partibus to be formed into one list for calling, written or printed, to be hung up on the calling days in the outer-house, as formerly practised in regard to the several lists for calling, together with all the said relative copies of separate rolls;" A. S. 11 July 1828, § 28.<sup>1</sup>

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<sup>1</sup> The mode in which the Calling List is made up will be seen from the following specimen:—

## OUTER-HOUSE CALLING LISTS.

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THURSDAY, JANUARY 13. 1848.

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W. BRUCE.—B.

Mr. JAMES DENHAM, *Assistant-Clerk*.

1. *Sum.*—*Poor* ARCHIBALD BLACK, lately residing at Portnacroisk, in the parish of Appin, now in Greenock, AG Doctor JOHN MACCOLL, residing at Rhugarve, Appin, as Inspector of the Poor of the United parishes of Appin and Lismore, p. Alex. Campbell. Patrick Turnbull, A.

3. *Adjud.*—(Bonds of Provision upon Robroyston.)—DAVIDSON and SYME, writers to the signet, and individual partners, AG ARCHIBALD



A complaint having been presented against an assistant clerk of court, for a deviation from the regulations of court,

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JAMES LAMONT of Lamont and Robroyston, as heir of the deceased Miss Georgina Lamont, his sister, and as charged by the citation on the summons to enter himself heir to her, conform to act of Parliament, *p. Welsh. Davidson and Syme, A.*

4. *Maills and Duties.*—JOHN SOMMERVILLE, residing at Windylaws, AG ROBERT SCOTT, supervisor or officer of excise, residing in Richmond street, Newcastle-upon-Tyne, and Walter Brydon, innkeeper in Peebles, *p. Geo. Ross. Menzies and Maconochie, A.*

R. BEVERIDGE.—B.

Mr. THOS. KNOX BEVERIDGE, *Assistant-Clerk.*

1. *Sum.*—SIR PATRICK MURRAY THRIEPLAND of Fingask, Baronet, AG SIR GEORGE DUNBAR of Hempriggs, Baronet, *p. R. Whigham. G. L. Sinclair, A.*

2. *Adherence.*—PETER LANG, residing at No. 10. Arniston Place, Edinburgh, husband of Anne Macartney Hill or Lang, residing with her father in No. 28. Scotland Street, Edinburgh, only daughter of John Hill, of the British Linen Company's Bank in Edinburgh, AG the said ANNE MACARTNEY HILL or LANG, *p. Geo. Deas. Duncan and Miller, A.*

3. *Transf. &c.*—GEORGE MILLER, formerly residing at Silverhill, Bothwell, now chemical manufacturer in Glasgow, AG DONALD SMITH, manager to, and for behoof of, the Western Bank of Scotland, and others, as per roll, *p. Moir. Wotherspoon and Mack, A.*

4. *Count, Reck. and Payt. for Over and Under Payments of Stipend.*—SIR JOHN GORDON SINCLAIR of Murkle and Stevenson, Baronet, and his Commissioner, and others, AG GEORGE TRAILL of Rattar, and others, as per roll, *p. Moncreiff. J. & J. M. Balfour, A.*

5. *Sep. and Aliment.*—MRS. JOAN CLERK HENDERSON or ORPHOOT, spouse of John Orphoot, printer, residing in Gilmour Place, Edinburgh, AG the said JOHN ORPHOOT, *p. Alex. Lothian. John Keenan, A.*

6. *Constit.*—ADAM CROOKS skinner in Kilmarnock, AG ROBERTSON CREELMAN, carpet manufacturer, now or lately of St John's, Canada, North America, or elsewhere abroad, and others, as per roll, *p. Tho. Cleghorn. James Mason, A. ;—*

And so on till till the cases called for the week, with the different clerks are exhausted.

in twice giving up a partibus of a summons to be called against the complainer, when the clerk had not the summons in his custody, nor any receipt to shew for it, and the summons had not been fee-funded, it was held that the clerk had committed an irregularity, but that this arose from an innocent and harmless mistake, and therefore no expenses were given, *Lang v. Lang*, 16 June 1831, ix. S. 748. The provisions of the A. S., 11 July 1828, § 26, directing a summons to be lodged with the clerk, on or be-

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At the end of each weekly calling list the number of cases called is stated, and the attention of practitioners is directed to the leading regulations regarding this stage of procedure. Thus;—

W. BRUCE,	.	.	.	5
R. BEVERIDGE,	.	.	.	24
T. HAY,	.	.	.	5
L. NIMMO,	.	.	.	24
R. WEMYSS,	.	.	.	23

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*Thursday, 13th January 1848.—Eighty-one Causes.*

THO. KNOX BEVERIDGE.

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The Summonses, &c. for the Calling Lists must be marked at the Fee Fund, and lodged (together with the relative productions) with the Clerks on or before

MONDAY, THE 17TH JANUARY 1848.

Vide Act of Sederunt, 11th July 1828, § 24, 25, 26, 27, 28, and particularly § 104, and Act of Sederunt, 8th August 1839, § 6.

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*Note.*—Although it is not necessary, under the provisions of the late statute, to specify in the calling lists the *Lord Ordinary*, it will save the practitioners much trouble, in transmission from one office to another, if they lodge their new causes for calling in the office of the Clerk attached to the Lord Ordinary before whom they contemplate enrolling them in the Outer-House rolls.

T. K. B.

fore the third day preceding that of the calling, is intended for the convenience of the clerks of court, and it is *jus tertii* for a defender to object that the summons was only lodged the day before the calling; *Macqueen and Mandy. v. Clyne's Trs.*, 20 May 1834, xii. S. 610.

SECT. VII.—SUMMONS, &C. MUST BE CALLED TEMPESTIVE.

A summons may be called on the day of compearance, *Spence v. Smith*, 25 Feb. 1772, M. 12,001. The court here proceeded on the report of the principal clerks, to whom they had remitted to inquire as to the practice.—*Tait's MS.*, "Preliminaries of Proces." Should any proceedings have inadvertently taken place, in absence of the defender, before expiry of the *induciæ*, they are null; but the pursuer may hold them *pro non scriptis*, and call his summons anew at the proper time, *ibid.* and *Yeoman v. Chalmers*, Nov. 1771. *Tait's MS.*, *ubi supra*; *Wilson v. Lochead*, 25 June 1778, M. 12,003; Sup. v. 481. Where "the last day of the legal *induciæ* of any summons, suspension, or advocation, or other writ, shall not be a sederunt day, then the day of compearance shall be held to be the first sederunt day thereafter; in citations upon the passive titles, the summons shall not be called in court till after the expiration of the *annus deliberandi*, unless the defender, by putting up protestation, shall waive objection to the citation;" A. S. 8 July 1831, § 3. See *Mackintosh v. Macqueen*, 9 July 1829, vii. S. 882; *Lyell v. Christie*, 18 Nov. 1836, xv. S. 41. In one case, *Cunninghame, Dougal and Co. v. Marshall*, 26 July 1780, M. 12,004, it was held, that even where the pursuer had called and enrolled his summons after *expiry* of the *induciæ*, he might insert a day of compearance in the blank of the summons, posterior to the date of calling, and then get it struck out, as prematurely called. It will, however be observed, that such a proceeding would create a

fatal discrepancy between the summons and the citation given to the debtor, and also with the execution, if it specified the day of compearance; for the citation given to appear on the day to which the debtor is cited, would be without a warrant. Such a proceeding cannot now take place, as no blank is left in the summons. The summons may be called at any time after the diet of compearance, provided it be within year and day of that date. If not called within year and day, it falls and cannot be wakened. *Drummond v. Stuart*, 27 July 1708, M. 11,980; A. S. 26 Feb. 1718. *Cumming v. Munro*, 19 Nov. 1833, xii. S. 61. It is not settled, whether it is necessary to make the summons fall, that both year and day be elapsed; *E. of Dunmore v. M'Inturner*, 13 May 1829, vii. S. 595; A. S. 8 July 1831, § 3.

Where the year has so nearly elapsed that it will expire before the summons can be called on a regular calling day, the court, on application, will allow it to be called on another day: but the interest of third parties cannot be affected by this procedure, and in a question with them the summons will be held to have fallen; *Thorburn v. Cox*, 18 June 1830, viii. S. 945. When a summons has been raised against two persons, but by mistake called against one of them only, and enrolled, the Court will allow the summons to be called in common form against the other, that he also may be proceeded against; v. Sup. 481. Tait's MS. "*Preliminarys of Proces.*" No second calling can take place after the first, except in the cases before specified, A. S. 26 Feb. 1718.

It is incompetent to call a summons of reduction of a Justice of Peace decree on the grounds of malice and oppression, unless the pursuer has previously found caution for expenses, 6 Geo. IV. c. 48, (22 June 1825, *Justices Small Debt Act*), § 15, enforced in *Crombie v. Landale and Pride*, 23 Nov. 1833, xii. S. 122.

## SECT. VIII.—EFFECT OF CALLING.

The calling of the summons is the first judicial step in the action, for it originally took place in presence of the judge, and the marking on the summons was signed by him. Ersk. iv. 1. 8; Tait's MS. *ubi supra*; *New Form of Process*, (2d Ed. 1799), § 54; *E. of Dundonald and Paul v. Henderson*, 9 Feb. 1838, xvi. S. 489. A summons may therefore be awakened at any time within forty years, if called, though not enrolled, as was found in a case where it had lain over for twenty-four years; *Ross and Wallace v. Cleghorn, &c.*, 22 July 1758, M. 11,996; Tait's MS. *ubi supra*. It is also generally held that this step renders the subject in dispute litigious in other actions than adjudications and rankings and sale, in which mere citation produces that effect; ii. Bell, Com. 153. Where a summons of forthcoming is produced as the pursuer's interest in a multiplepoinding, it is unnecessary to call it; *Mansfield, &c. v. Smith, &c.*, 17 June 1795, M. 12,009.

Litigiosity should in no case take place till the summons is called, and a record ought to be established, in which the names of the pursuer and defender, and of the lands, &c. claimed, should be inserted. Until the summons is called and recorded, purchasers or creditors should not be affected by the litigosity.

## B.—OF PROTESTATIONS.

## SECT. I.—FORM OF.

Where the pursuer does not call his summons on expiry of the *induciae*<sup>1</sup> the defender may force him either to proceed

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<sup>1</sup> " If, according to the late decision, (*Spence v. Smith*, *supra*, p. 274), a summons may be called on the last day of compareance, and insisted in

with the action, or to allow it to fall by protestation. "A protestation is this. A party is called to compear and answer upon a day certain. He appears accordingly, but his party appears not to lay claim against him; upon which he protests that he shall not be bound to compear again without being summoned on a new summons."—Tait's MS. "Procedure before Ordinary, Defender absent." The form of putting up protestation is to deliver to one of the outer-house clerks a note in this form:—"P. (*i. e.* protestation) for not calling, enrolling, and insisting in summons of multiplepoinding, A. B. writer in E. against C. D. merchant in L. Summons dated and signeted in April last or since, per F. (counsel's name), G. H. Agent." The clerk marks this note with his office mark, adhibits to it the date of presentation, and returns it to the agent for the defender, who delivers it to the keeper of the minute book to be inserted. Being a judicial proceeding, it must be dated on a sederunt day. If any material error be made in the protestation, or the summons be not dated and signeted within the period mentioned, the protestation will of course be null, as not properly applying to the summons.

The protestation must bear the name of the agent as well as of the counsel of the party who puts up the same, under a penalty of twenty shillings, A. S. 13 Feb. 1787.

#### SECT. II.—PROCEDURE IN.

"When protestation is put up in the minute book for not calling any summons, suspension, or advocacy, the keeper of the minute book shall be bound to score the same on

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against a defender; it must be competent, *ex contrario*, for a defender to put up a protestation on that day against the pursuer for not insisting."—See Rem. Dec. *Anderson v. Begbie*, observed by Kaimes, No. 40. By the former practice it could not be put up till the day after."—Tait's MS. "Procedure before Ordinary,—Defender present,—Pursuer absent."

production to him (before a warrant is issued for extract of the protestation) of a certificate from a depute clerk of session, or his assistant, that the summons, suspension, or advocacy, has been duly lodged with him in order to calling, and not otherwise; and after granting such certificate, the clerk shall be bound to see that the procedure herein before enjoined be regularly and immediately followed out in calling the same; and it is further declared, that a protestation shall have no effect in transferring the lead in the cause from the raiser of the summons, or letters, to the party entering protestation," A. S. 11 July 1828, § 30.

If no such certificate is produced to the keeper of the minute book within nine free days from the date of the protestation, then the keeper, on the application of the defender, will give out the protestation to be extracted, by writing on it "*Edinburgh, (date.) Given out to be extracted. (Signed) Dav. Cormack.*" After this warrant is issued, the keeper of the minute book cannot score the protestation, and it is incompetent to interdict the extractors from issuing an extract of the protestation, *Graham v. Boosie*, 9 Mar. 1831, ix. S. 566. In *Creightons v. Deans*, 22 June 1832, x. S. 695, it was observed that the court cannot interfere to stay extract of a protestation for not insisting, till an enrolling day should arrive, where the delay has not been occasioned by any act of the defender. See also *Craigie, Susp.*, 24 Nov. 1829, viii. S. 113. To enable the extractor to extract the protestation, a copy of the summons, advocacy, or suspension, must be delivered to him. Even without a formal extract by the extractor of court, Lord Ivory held that protestation, when given out by the keeper of the minute book to be extracted, throws the process out of court, *Ingram and Co. v. Bains, Morrison and Co.*, outer-house, (not reported). When the extract is signed the action is at an end, and the defender cannot be called on to an-

swer till cited on a new summons.<sup>1</sup> The pursuer is likewise liable to the defender in £10 Scots of protestation money, for which the extract of the protestation decerns, and which may be recovered by the ordinary diligence; but he cannot be made to pay the expenses actually incurred, and may bring a new action without doing so, *Laidlaw v. Smith*, 8 Mar. 1834, xii. S. 538; *Williams and Mandy. v. Allan and Watson*, 20 Feb. 1841, iii. D. 601. It is not unusual, after putting up protestation, to forbear extracting it, with the view of preventing the pursuer harassing the defender, by citing him in a new action. In the above case of *Laidlaw*, however, it was held that a pursuer, before enrolment, may abandon his action by letter, and raise a new summons, containing *in gremio*, an abandonment of the former, without subjecting himself in payment of any expenses beyond the protestation money, should protestation be put up and extracted by the defender. See also *Howie or M'Gregor v. M'Gregor*, Feb. 1828, vi. S. 475, and *supra*, p. 203. *Infra*, P. iii. 1. 1, *in fin.* If the defender is willing that the action should proceed, he may pass from his protestation at any time, and allow the summons to be called and enrolled; i. Ivory, 188, Note.

Where there are more defenders than one, protestation is only available for those who put it up or authorize and concur in the same, *Sceales v. Commercial Bank*, 5 Feb. 1839, i. D. 465.

It has been already stated, that nine days, after putting up protestation; must elapse before it can be given out to be extracted. If the tenth day should happen to be on Saturday,

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<sup>1</sup> " This is the established opinion, but some have thought that there is no occasion for a new summons,—but only for a new citation on the old one.—See Fount., v. i. p. 91."—Tait's MS., *ubi supra*.



the protestation is not given out to be extracted on that day. Even although the nine days should have expired before Friday, if a warrant for extract should not have been applied for sooner, it is never given out on Saturday. This has been the immemorial usage. The reason of the practice appears to be, that Saturday being the enrolling day for the ensuing week, and a warrant for extract not being applied for or obtainable before that day, the pursuer has then the privilege of enrolling his cause if he choose to do so. As no warrant for extract is given out on Monday, he may also on that day lodge his summons with the clerk for the purpose of being called, but it is necessary that he exhibit to the keeper of the minute book, by ten o'clock the next day, a certificate by the clerk that the summons is lodged for that purpose, as, without such certificate, the keeper of the minute book is bound to give out the protestation to be extracted, if applied for by the defender's agent, by ten o'clock of Tuesday.

Where the protestation is in the above form for "not calling and enrolling," it would appear that it should subsist until the summons is enrolled. But this is not the case, for the practice is, to hold the protestation as at an end, when the summons is called. The defender has then to enter appearance, and take out the summons to see. But if he should lodge defences the next day, and intimate his having done so to the pursuer's agent, he may then put up a protestation for not enrolling and insisting.

It is necessary to authorize the keeper of the minute book to score a protestation for not enrolling, that the summons be produced to him with a marking of enrolment; and it is irregular for the clerk enrolling a summons to mark it without enrolling it, *Bryson v. Burnet and Jaffray*, 18 Dec. 1813, F. C.; and a summons against which protestation has been put up can only be enrolled on a regular enrolling

day like any other summons, *Fairlie v. Begbie*, 14 June 1816, F. C. See *Creightons*, *supra*.

When a protestation has been put up before the expiry of the *induciæ*, two courses seem open to the pursuer. The first and most usual is, to produce the summons to the keeper of the minute book, and get the protestation scored as premature, and this may be done, though the *induciæ* be expired as to the defender putting up protestation, if there be other defenders called, and the day of compareance as to them has not arrived, *Macpherson Grant, Petr.*, 3 June 1809, F. C.; or, *secondly*, the putting up protestation may perhaps be held a dispensation with the remainder of the *induciæ*, and the pursuer may therefore be entitled to call his summons, and get the protestation scored, on producing a certificate of the fact from the clerk; *Butter v. M'Donalds*, 7 Aug. 1769, M. 11,999.

It is no objection to a protestation that it has been put up after the pursuer has been sequestrated, nor are the protestation dues affected by the sequestration, though it has been awarded the day after the execution of the summons; *Love v. Menzies*, 23 Jan. 1830, viii. S. 380.

Where a summons has not been called, the protestation must be put up within a year from the diet of compareance, as the summons by the elapse of this period falls. Where the summons, however, has been called, protestation may be put up at any time within forty years; but if a year have elapsed from the date of calling, the process is asleep, and before putting up protestation a summons of wakening must be executed against the pursuer. The protestation then bears, "*P. (i. e. Protestation) upon a wakening*," &c. If protestation is put up in such a case without a wakening, it will at once be scored upon production of the summons, which will prove it is asleep. By A. S. 8 July 1831, it was declared that "letters of suspension or of advocation not executed within year and day of the date of signeting, or though duly

executed within that period, if not called within year and day of the day of compearance, shall as heretofore be held to fall asleep."

#### SECT. III.—JUDICIAL PROTESTATION.

Where a pursuer, after enrolling his action, forbears to insist and keeps up a summons, the defender, on producing the copy served on him, may obtain from the judge judicial protestation, 1672, c. 16, (*Regulation of the Judicatories*, c. 40, Th. Ed. viii. 80), § 10, "which the clerk writes upon the copy, and this being extracted like the other protestations at the minute book, puts an end to the instance.—Tait's MS. "Procedure in absence of Pursuer."<sup>1</sup> The pursuer cannot be reponed except of consent, unless the pursuer make application to the Lord Ordinary the same week the protestation has been obtained, and only upon payment of the expenses incurred; for the A. S., 20 Nov. 1711, § 5, empowers the Lord Ordinary to give what expenses he may consider proper, and the whole expenses were allowed in an old case; *A. v. B.* 26 July 1734, Elch. Pro. No. 4, which appears to have been followed in practice as a precedent; 1 Bev. 279-282.<sup>2</sup>

#### SECT. IV.—PROTESTATIONS IN SUSPENSIONS AND ADVOCATIONS.

The rules as to protestations in suspensions and advocations, are similar to those in the case of summonses.

Before the changes in the form of proceeding in advocations and suspensions effected by 1 and 2 Vict. c. 86, (10 Aug. 1838), and relative A. S. 24 Dec. 1838, there was a difference in the form of putting up a protestation for a suspension or advocacy, from that used in an ordinary action. Protestation was

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<sup>1</sup> Mr. Tait gives the following form:—

"To be wrote on the back of the copy of citation.

1st Feb. 1778. Lord Kennet—Actor for the pursuer absent.—Crosbie for the defender.—Admits protestation for not insisting."

<sup>2</sup> This form of protestation is now unnecessary and obsolete.

put up, not "*for not calling and enrolling,*" but for the suspension itself. Thus, "*Prot. A. B. charger, against C. D. suspender ; suspension, dated and signeted,*" &c. The reason of this was, that if the suspender allowed the charger to put up protestation, he lost the lead in the suspension or advocacy, the charger became *dominus litis*, and was therefore entitled to get the letters themselves, that he might call and enrol them. Latterly, however, the form of the protestation was the same in both cases, for § 30 of A. S. 11 July 1828, *supra*, declared, that the putting up protestation should not transfer the lead in the cause. The same remark applied to the form of protestation for an advocacy, viz. "*P. and remit,*" &c. The keeper of the minute book scored the protestation, on producing to him a certificate from a clerk, that the letters had been lodged with him to be called. And it was held that a clerk might grant the certificate, though reasons of suspension, &c. were not also lodged with him with the letters, if the reasons were lodged before the calling day ; *Burntisland Whale Fishery Co. v. Leven and Morrison*, 22 Dec. 1831, x. S. 181. If, therefore, after being called, the advocator or suspender did not enrol them, a protestation was put up again for not enrolling, as in the case of a summons.

Under the new form of proceeding in advocations and suspensions, the notes, after due intimation, may, on expiry of fifteen days, be called and enrolled, in like manner as the former expedite letters, 1 and 2 Vict. c. 86, (*supra*, p. 268). And on the expiry of fifteen days after the interlocutor passing the note shall have taken effect, protestation may be put up as in ordinary processes ; and if protestation is extracted, the respondent or charger may apply to the Lord Ordinary on the Bills for his expenses both against the principal and against the cautioner.—Relative A. S., 24 Dec. 1838.

Power should be granted to the Lord Ordinary in every

case to decern for the actual expenses incurred. It is ridiculous to allow a man to be harassed with an action, to put him to the expense of preparing defences, or answers to reasons of suspension or advocation, and then to give him £10 or £15 Scots in full of his expenses, more especially when the extract of the protestation costs 16s. 7d.

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## CHAPTER V.

### OF ENTERING APPEARANCE, AND OF LODGING DEFENCES.

The summons being called, "appearance may be entered for defenders, respondents, or chargers, in terms of the Act of Sederunt, 11 Mar. 1820, at any time during office hours, after six o'clock in the afternoon of the calling day, or between the hours of six and seven o'clock of the afternoon of the day following;" A. S. 11 July 1828, § 31.

When the summons is called, the clerk adds to the Partibus a short marking, thus:—"(*Date*) *Act A.*" (*for Actor pursuer's counsel*), and where appearance is made, he completes it thus, "*Alt. B.* (*for Alter, defender's counsel. To see. Agent, C.,*" and then adds his mark. A similar marking is made on the roll of defenders' names, where there is one. If no appearance be entered, the Partibus is thus completed: "*(Date) Act. A. Alt. absent. To the roll of undefended causes,*" and then the clerk's mark is added. These markings were originally signed by the Lord Ordinary.

"Upon entering appearance, the defender, respondent, or charger, shall have right to retain the process for twelve days after the day on which it was called, but on or before the thirteenth day thereafter, in time of session, he shall return it, and if he abide by his appearance, shall lodge therewith his defences in the action, or answers to the rea-

sons of advocacy, (where these are required), or answers to the reasons of suspension; and in the case of a suspension, the charger shall, with his answers, lodge the charge, unless it be a suspension of a threatened charge. Providing that where the said thirteen days expire during a vacation or recess, the defender or respondent may delay returning the process with defences or answers till the first box day in vacation or recess, declaring, that the time to be allowed for seeing summonses of *cessio bonorum* shall in no case exceed six days, and during the last three weeks of session, the time shall be limited to forty-eight hours. (See procedure in *Cessios* under new form, *infra*, P. v. 4).

“ When appearance is entered by any agent for one or more, but not for all the defenders or respondents, the agent so entering the first appearance shall be entitled immediately to borrow the process, and the appearance shall be marked by the clerk on a separate paper, to be retained by him for subsequent entry of appearance for any other parties; and in case appearance shall afterwards be entered by any other agent, that agent shall intimate the same by letter to the agent by whom the process has been borrowed, who shall in that case be bound to return it, on or before the fourth day after his entry of appearance, when there are more than two defenders; but if no more than two, on the seventh day, so as time and opportunity may be allowed for the agent or agents of other parties to examine the same, to whom it shall be lent by the clerk; and if more than two defenders, each may retain it for forty-eight hours, and the lodging of defences or answers by all the parties who shall abide by their appearance, shall be made on or before the thirteenth day after the first calling of the cause; and the Lord Ordinary may afterwards, on the application of a party who has not been permitted to borrow the process before lodging defences or answers, and on cause shewn, allow his agent

to borrow the same, and allow defences or answers, to be lodged within a reasonable time thereafter;" A. S. 11 July 1828, § 32.

The above Act of Sederunt, § 33, provides, "that the agent for the defender, &c. shall, along with the printed process, copy of defences, or answers to reasons of advocacy or suspension, lodge in the hands of the clerk to the process another printed copy for the use of the Lord Ordinary, which shall be given to the agent for the pursuer, advocator, or suspender, when he borrows the process to enrol, without any additional fee; and he shall deliver a printed copy of the summons, letters of advocacy or suspension, along with such copies of the defences or answers, to the clerk who makes up the outer-house rolls." (See *infra* P. ii. 7. 1.)

Summonses of multiplepoinding, adjudication, constitution, wakening, transference, and (*cessio bonorum*), do not, however, require to be printed; *ibid.* § 77. Without the copies of the summons and defences, or suspension and answers, or advocacy and answers, when these are required to be printed, the clerk cannot enrol the cause; *ibid.* § 38; see *supra* P. ii. 4. A. 5.

"If the defender, respondent, or charger, shall fail to return the process on or before the thirteenth day as aforesaid, the clerk shall, if required, issue a caption for the same in common form; and shall also, in case of failure so to return the process, or to lodge therewith defences, or answers to the reasons of advocacy or suspension, grant, if required, a warrant of enrolment, as if no appearance had been entered; and the keepers of the outer-house rolls shall hold as a sufficient warrant for enrolment the signature of the clerk upon the slip or note for enrolment, which, by the existing usage, is furnished by the agent to the clerk who makes up the outer-house rolls;" *Ibid.* § 34.

## CHAPTER VI.

## OF THE DEFENCES.

## SECT. I.—FORM OF DEFENCES.

THE act 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 2, enacts, “that the defender or defenders shall, in the defences, state in explicit terms every defence, both dilatory and peremptory, on which he or they means or mean to rely, and shall in particular meet the statement of facts and conclusions deduced from them in the pursuer’s summons, either by denying the facts therein stated or by admitting the same, and in answer setting forth in explicit terms the facts on which the said defender or defenders found, subjoining a summary of the pleas in law which are to be maintained by such defender or defenders.” The Act of Sederunt 7 Feb. 1810, enacts, “that the defences shall not contain argument, but only a concise statement of the facts on which the defender founds, and a summary of the pleas in law which he is to maintain as applicable to these facts.” The defender will not be allowed to shift his ground. So where a party was sued for payment of the price of a cow, and having gone to proof on denial of the purchase, he was not allowed afterwards to plead presumed payment, *Kidd v. Brown*, 17 May 1828, vi. S. 825. A preliminary plea is too late if not stated in the defences, or at least if not discussed or reserved before closing the record, *Laidlaw v. Dunlop*, 11 Mar. 1831, ix. S. 579; *Miller v. Stewart*, 17 Feb. 1835, xiii. S. 483. On an objection being stated by the pursuer in the outer-house to defences lodged, on the ground that the pleas in law, instead of being “short and concise,” and “without argument,” in terms of § 9 of the A. S. 11 July 1828, were of great length and argumentative, the Lord Ordinary (Murray) was of opinion that this enact-



ment could not be applied to defences, *Moffat v. Hays*, outer-house, 18 Feb. 1846, (not reported). Where defences are not properly prepared, they will be ordered to be amended, and the defender will be found liable in the expenses thereby incurred by the pursuer; see *infra*, P. iii. c. 3.<sup>1</sup>

#### SECT. II.—EFFECT OF ADMISSIONS IN DEFENCES.

In preparing defences, one or two points ought to be kept in view. Thus, care should be taken what admissions are made, as they will not easily be allowed to be retracted, *M'Leod v. Thompsons*, 8 Feb. 1822, i. S. 300, (N. E. 279); *Anderson v. Pott*, 28 Feb. 1829, vii. S. 499; *Lowe v. Taylor*, 24 June 1843, v. D. 1261; and a defender may be excluded from the benefit of his legal pleas, as prescription, &c., by statements in his defences, *Maule v. Sommers*, 21 June 1822, i. S. 514, (N. E. 475); *Henderson v. Steel*, 22 Jan. 1829, vii. S. 303. Where the defender is pursued for a debt of a predecessor he does not represent, care must be taken how a peremptory defence, such as payment, prescription, compensation, be pleaded, for he will thereby run some risk of incurring a passive title, Ersk. iii. 8. 93; but as the judicature act now requires parties to state their whole defences, dilatory and peremptory, at once, a peremptory defence, subjoined to that of non-representation, will not infer a passive title, *Smith v. Drummond and Bayne*, 25 June 1829, vii. S. 792. Where the action is founded on a bond or bill, however, the heir

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<sup>1</sup> Till the passing of the Judicature Act, defences always concluded with the words "Under protestation to add and eik." "The common way in practice is," says Mr. Tait, "to return some one defence, perhaps the most trivial of the whole, adding the words, "under protestation to add and eik," MS. "Preliminaries of Proces." As defenders are now obliged "to state, in explicit terms, every defence, both dilatory and peremptory," the protestation is no longer applicable, (Adam, pp. 16, 27), and is giving way in practice to the more general concluding expression, "In respect whereof, &c."

may safely state the defence that they are *ex facie* null, as this merely tends to exclude the pursuer's title without founding on the ancestor's right, and no proof is necessary, *Kilpatrick v. Ferguson*, 21 Nov. 1704, M. 12061; *Renny v. Balleny*, Jan. 1742, M. 9721. Judicial admissions are, however, in a different situation from statements in an oath on a reference. In the latter, all statements which are not intrinsic must be proved, but one who founds on a judicial admission must take it with any explanations with which it is accompanied, *Carnegy v. Carnegy*, 22 Feb. 1825, iii. S. 566, (N. E. 389); *Grierson v. Thomson*, 14 Jan. 1830, viii. S. 317: but such explanations or qualifications may be redargued by contrary evidence, *Anderson v. Rintoul, &c.*, 3 Feb. 1825, iii. S. 496, (N. E. 345), and 1 June 1827, v. S. 744, (N. E. 694); *Gall v. Fordyce and Middleton*, 11 June 1828, vi. S. 943.

#### SECT. III.—EXCEPTIO FALSI EST OMNIUM ULTIMA.<sup>1</sup>

Where falsehood or forgery is one of the defences, attention must be paid to the rule *exceptio falsi est omnium ultima*, i. e. if the defender, after proponing improbation, fail in this defence, he cannot make any other objection against the writing, as that it is null, extorted, &c., and he must there-

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<sup>1</sup> In the case of *Binny v. Smiths*, 26 Jan. 1836, xiv. S. 355, a bill of suspension was passed containing no ground of suspension but that of forgery. Reasons and revised reasons were lodged which alleged no other ground. It was held competent, in re-revised reasons, to state other facts and pleas, (such as the chargers having no valid right to the bill, even if genuine), in respect the record was not yet closed, and the charger had not been called on to abide by the bill, nor the suspender to consign.

The rule of pleading, *Exceptio falsi, &c.*, appears to have but a very limited application to our forms of process, since they were remodelled by the Judicature Act and subsequent Acts of Sederunt. The defender must now state his whole defences at once, and the proponing of one is no pass-

fore choose which of these defences he will insist in, *Ker v. Forsyth*, 5 Feb. 1635, M. 12,138; *Forrester v. Rowat*, 8 July 1697, M. 12,061. By failing in the improbation, the deed challenged becomes unexceptionable, *Hamilton and Baird v. Hunter*, 23 Nov. 1743, M. 6772, and the rule is the same where the pursuer propones improbation against any writ produced by the defender; *Peacock v. Baillie*, 3 July 1662, M. 12,140. But this rule does not exclude the defender from any defence which implies an acknowledgment of the writ, as payment or compensation, — *v. E. of Kinghorn*, 23 Jan. 1666, M. 12,141; *Forrester*, *supra*.

It may, however, be mentioned, that the above rule only applies to the case where forgery is pleaded as a defence or reply; for, when brought forward in the form of an action of reduction improbation, the pursuer, though he fail, may plead other nullities, *Innes v. Gordon*, 22 Feb. 1676, M. 12,056; *Binnie v. Gibson*, 15 June 1677, M. 12,057, *Dawson and Hill v. Murray, &c.*, 13 Feb. 1706, M. 12,149. Thus, one may pursue a reduction improbation of a writ, on the grounds of forgery, of the want of the statutory solemnities, and on the head of deathbed and forgery, &c.; *Hutton v. Gibson*, 23 Mar. 1824, ii. S App. 110. On the subject of this section, see *Stair*, iv. 40, 39; *Bankt.* i. 10. 217, &c., *Ersk.* iv. 1. 68, and *infra* P. iii. 2. 2. and iv. 8. 12–13.

It has been much questioned, whether the plea of improbation can be retracted, after the user of the deed has agreed to abide by it, *sub periculo falsi*; and the question cannot be held as settled; *Dunbar v. E. of Cromarty*, 16 July 1713, M. 12,151; *Hamilton and Baird v. Hunter*, 23 Nov.

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ing from the others. *Binny supra*, and Lord Corehouse's note. From the conflicting opinions on the Bench, in the case of *Hamilton and Baird v. Hunter*, noticed in the text, it will be observed that the practical application of the maxim, even in our older practice, was not clearly fixed. See the form of making up the record, where forgery is pleaded, *infra*, P. iv. 8. 12.

1743, M. 6772; *Gray and Corbett v. Gray*, 25 June 1734, Elch. Process, No. 2; *infra* P. iv. 8, 12–13.

SECT. IV.—WHEN SEVERAL DEFENDERS HAVE THE SAME DEFENCES.

When a number of different defenders are called in the same action, (or in separate actions, relating to the same matter), and these defenders have precisely the same defences, one paper setting forth the defence, should be lodged in the action, (or in each of the actions), and separate *pro forma* defences, referring to the leading defence given in; *Cowie, &c. v. Merry*, 18 Nov. 1828, vii. S. 23. See *Bett v. Arnott and Macash*, 27 June 1828, vi. S. 1032.<sup>1</sup> Where, after defences have been lodged, one of several pursuers has withdrawn, the defender is entitled to lodge additional defences, arising out of this circumstance, *Bontine, &c. v. Dixon, &c.*, 30 June 1829, vii. S. 813.

See as to Dilatory Defences, *infra* P. iii. 2.

## CHAPTER VII.

### OF THE OUTER-HOUSE ROLLS.<sup>2</sup>

#### SECT. I.—PRINTED (WEEKLY) ROLLS.

THE rolls of the court were regulated by 1672, c. 16, (c. 40, § 1, *et seq.*, *Regulation of the Judicatories*, Th. Ed. viii. 80.)

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<sup>1</sup> The separate defence referring to the formal and leading paper, may be in such terms as these: “DEFENCES for E. F. in the action at the instance of A. B., against him, C. D., G. H., and others.

The defender has seen the Defences for C. D., in this case, dated the day of . The defender adopts the statement of facts therein contained, and summary of pleas in law subjoined thereto, and holds the same as here repeated, for and on behalf of himself. In respect whereof, &c.”

<sup>2</sup> “The first mention of a Roll is in Books of Sederunt, 11 June 1604,

The regulations therein contained are now almost entirely in desuetude; and it is therefore unnecessary to detail them. Prior to the great changes introduced in 1838, which will be immediately explained, there were, besides the hand rolls of the Lords Ordinary, four outer-house rolls, which were printed every week during session: viz., 1. The regulation roll.<sup>1</sup> 2. The suspension and advocacy roll. 3. The ordinary action roll. 4. The reduction roll. It is necessary to premise some account of those rolls, to render the later changes intelligible.

In the first were enrolled all cases which were appropriated for trial by jury, whether appearance had been entered or not, 6 Geo. IV. c. 120, (*Judic. Act*, 25 July 1825), § 29; see *infra*, P. iii. 7. 2.; and all cases in which no appearance had been made for the defender, or in which the defender had not returned defences; A. S. 11 July 1828, § 34. Also all reductions which formerly required to be sent *de plano* to the Jury Court, i. e. reductions, on the head of furiosity and idiotcy, or on facility or lesion, or on force and fear, *Ibid.*, § 35; 6 Geo. IV. c. 120, § 28. But other reductions, except reductions of admiralty decrees, *A. v. B.* 25 June 1831, ix. S. 805, whether appearance had been entered or not, went to the reduction roll. In the suspension and advocacy roll, were enrolled all suspensions and advocations, whether appearance had been entered or not. Where no appearance had been entered, the enrolment bore, "Susp. in ab." or "Adv. in ab." In the ordinary action roll were entered all ordinary actions, in which appearance had been

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where one is appointed to be made up by the Chancellor and President, and the order of it kept exactly." Tait's MS. "Of the Rolls for the Outer-House." See as to the "Table" previously in use, 1537, c. 44, &c. i. e. A. S. 27 May 1532, § 1, &c. (*supra* p. 2, Note 1): Balf. 271; Stair, iv. 2. 5.

<sup>1</sup> So called from having been introduced by the Act of *Regulations*, 1695, § 21; A. S. 209.

entered, and defences lodged for any of the defenders. The reduction roll was divided into two parts, the reduction roll for the first division, and the reduction roll for the second, A. S. 11 July 1828, § 39. Each summons of reduction belonged to that division to which the clerk was attached in whose office the process was lodged; *Ibid.* § 35.

It is unnecessary to describe minutely the mode in which those rolls were called. Each of the four permanent Lords Ordinary sat alternately as Lord Ordinary for the week. The different rolls were gone through by them, and by the other Lords Ordinary, on certain days, according to various regulations enacted from time to time. The Lord Ordinary officiating on the Bills (the junior Lord Ordinary), was judge in all reductions and teind causes.

The system was much simplified by the rules introduced by 1 and 2 Vict. c. 118, (16 Aug. 1838), and relative A. S. 24 Dec. 1838, (*Enrolment of New Causes, &c.*).

By § 1 of the statute, it is declared that the junior Lord Ordinary shall act as one of the permanent Lords Ordinary, and shall be on the same footing in regard to preparing and deciding causes, with the other four; and it shall be competent to enrol new causes before him, in the same manner as before any other Lord Ordinary: Provided that (with the exception as to actions of reduction and teind causes after mentioned) the other duties of the junior Lord Ordinary shall continue as formerly: Provided also, that it shall be competent to either division of the court, in case of a pressure of business before the junior Lord Ordinary, to remit the summary causes now in use to be prepared by him, to such of the other Lords Ordinary, and for such time as may appear expedient, or for the court, from time to time, to relieve him of the duty of taking up a weekly roll of new causes, for such time as may be thought proper.

By §§ 2 and 3, it is farther enacted, that the practice of

enrolling all reductions exclusively before the junior Lord Ordinary shall be discontinued, and it shall be competent to enrol them before any of the five Lords Ordinary; and on the occurrence of the first vacancy in the office of any of the then Lords Ordinary, (an event which has occurred), the second junior Lord Ordinary shall judge in teind causes.

The regulation by which either of the four permanent Lords Ordinary in rotation officiated as Ordinary for the week, is discontinued, and it is now competent to enrol new causes before any of the Lords Ordinary, without regard to such rotation; and any Lord Ordinary may discharge the duties of Lord Ordinary on oaths and witnesses, (*supra*, p. 69, Note); and the Lords Ordinary shall not be exclusively attached to either division of the court, but equally to both divisions; and the Partibus written upon summonses, letters, or notes of suspension, advocacy, or other writ, shall set forth the division of the court to which the cause shall belong; and in the event of the cause being afterwards removed to the inner-house by reclaiming note, cases, or otherwise, it shall be carried to the particular division so set forth, and the division to which the cause is to belong, shall be stated in the weekly printed rolls. The division cannot be changed at enrolment. *Thomson v. Lindsay*, Feb. 1848, Lord Robertson, (not reported).

The Act of Sederunt declares, § 1, that the Lords Ordinary and their successors shall continue to officiate in the outer-house on those days of the week set apart to them respectively; and the new causes of each judge shall be published weekly in printed rolls, which his Lordship shall call on the first day of his weekly attendance in the outer-house, and before proceeding to his other rolls, without prejudice to the Lords Ordinary obtaining leave from the court to sit on any other day which they may require for any special business before them.

§ 2. The mode of enrolling new causes shall be by notes given by the agents to the keepers of the rolls ; but instead of specifying any roll, the note shall set forth the name of the Lord Ordinary before whom the new cause is to depend in the outer-house, and the division, whether *first* or *second*, as marked in the *partibus*, to which the cause shall belong, and the general nature of the action—whether sum., declar., adjud., dam., adv., susp., red., or whatever else its nature may be, shall be marked by a short abbreviation in the said Notes.

§ 3. “ The keepers of the outer-house rolls shall no longer make up separate rolls, under the names of *regulation roll*, *suspension roll*, *ordinary action roll*, and *reduction roll*, all such division being hereby discontinued. But the rolls of new causes, when taken up, shall be so arranged and printed, as to exhibit for each judge weekly—1st, *roll of “ undefended causes,”* in *two sections*, containing in the *first* or upper section thereof, all causes marked for the *first division*, marked generally in the manner specified in the end of section 2 ; and in the *second* or following portion of the said roll, all causes marked for the *second division* ; and 2d, a *roll of “ defended causes,”* divided in like manner into separate sections for first and second division causes, with the nature of the action briefly described or marked as aforesaid : Provided that, in the said roll of *undefended causes*, and in the notes given in by the agents for enrolment therein, the parties, defenders, and respondents, shall be named and designed at full length, in like manner as absent defen-

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<sup>1</sup> The notes are in such form as this :—

“ LORD CUNINGHAME.—First (or Second) Division.—*Defended Cause*.—Sum. B. against F., p. H., (Counsel’s name.) L. M.—A. (Agent.)”

It is not necessary or usual to state the Christian name of the parties or their designations, except in the case of defenders in undefended causes. (See text).



ders have been heretofore designed in the regulation roll ; but declaring that, in cases where there are more than six defenders, the practice at present in use, to make reference to a roll published on the walls of the outer-house, shall be continued." (Sec. 1672, c. 16, (c. 40, Th. Ed. viii. 40), § 2).

§ 4. " In future, when causes appropriated for jury trial are printed and put out in the calling lists, the defenders shall be bound to return defences along with the summons, as in other actions ; and failing their doing so, the case shall be put to the roll of " undefended causes " ; and if no defences are returned, the pursuer shall be entitled to decree, or such order as he may crave, according to the practice previously in use in regulation roll cases ; declaring farther, that nothing herein contained shall be held to derogate from the enactments of prior statutes, still subsisting, whereby the actions therein enumerated are specially appropriated to jury trial ; but, on the contrary, all such actions, whether entered in the printed roll of " defended causes ", or of " undefended causes ", in case of the defenders in such causes being reponed against any decree in absence, shall be afterwards remitted to the jury roll, and proceeded in according to the enactments of preceding statutes and acts of sederunt, still unrepealed, as to jury cases."

§ 5. " The regulation prescribed in the preceding section shall be so far qualified, that in processes of reduction, whether falling within the class of actions appropriate to jury trial, or of any other nature, the defenders, in terms of prior acts of sederunt, shall not be bound to return defences with the summons, unless they have preliminary defences ; but all summonses of reduction, if appearance for the defender has been marked at the calling, shall be enrolled in the roll of " defended causes ", and if no appearance has been so marked, they shall be enrolled in the roll of " undefended causes ", and proceeded in according to the forms at present observed

in actions of reduction, in which no appearance has been entered."

The days on which the Lords Ordinary sit at present (March 1848) are as follows :—

Lord CUNINGHAME, on Tuesday, Wednesday, Thursday, Friday.

Lord MURRAY, on Tuesday, Wednesday, Thursday, Saturday.

Lord IVORY, on Wednesday, Thursday, Friday, Saturday.

Lord WOOD, on Tuesday, Wednesday, Friday, Saturday.

Lord ROBERTSON, on Tuesday, Thursday, Friday, Saturday.<sup>1</sup>

The outer-house rolls are taken up each Saturday forenoon during session, 1672, c. 16, § 2, in the lobby of the Parliament House, by one of the clerks of the inner-house judges in rotation; 1 and 2 Geo. IV. c. 38, (28 May 1821), § 16.<sup>2</sup>

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<sup>1</sup> Lord Ivory's "Blank-day," as it is usually called, is accordingly Tuesday.  
 Lord Robertson's, ..... Wednesday.  
 Lord Wood's, ..... Thursday.  
 Lord Murray's, ..... Friday.  
 Lord Cuninghame's, ..... Saturday.

<sup>2</sup> "These Rolls are in the following form :—

LORD CUNINGHAME.—Mr. BEVERIDGE, Clerk.

*Tuesday, 11 January 1848.*

#### UNDEFENDED CAUSES.

##### FIRST DIVISION.

1. Declar. and Adjud. Reid and others AG Robert Carrick Donaldson, surgeon, New Mills, Ayrshire, only surviving son and heir of the late Alexander Donaldson, Clerk in the Branch of the Royal Bank at Glasgow, now deceased, who was the last surviving and acting trustee under trust-disposition and settlement by Mrs. Janet Hart or Holman,

The summons, advocacy, or suspension, must be produced with the enrolling note, to shew that the note agrees with the partibus; but if the defender, &c. has not returned the process in time, the signature of the clerk upon the slip, or note, is a sufficient warrant for enrolment without

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now deceased, spouse of Fendelas Holman, surgeon, sometime residing in Glasgow, *p* Patton. Ja. Buchanan, A.

### SECOND DIVISION.

2. Poinding the Ground, Fair or Hodges AG Edward Duffin Alison, doctor of medicine and apothecary in Edinburgh, and others per roll, *p* Handyside. Geo. Gray, A.

3. Sum. Hunter AG The Earl of Buchan, residing at Amondell House, and Patrick Forbes, W. S., formerly residing in Leopold Place, now in No. 2, Melville Street, Edinburgh, *p* Macfarlane. Jo. Henderson, A.

### DEFENDED CAUSES.

#### FIRST DIVISION.

4. Sum. (Maritime) Callendar and others AG Cavan Brothers, and Company, *p* Horn et Patton. Maclean & Martin and Geo. Moncrieff, A.

5. Sum. (Bridge Money) Macdonell AG The Commissioners of the Caledonian Canal, *p* Advocatum, Patton et Moncrieff, Storie & Baillie and J. & J. Hope, A.

6. Dam. Idem AG Eosd. *p* Eosd. Iid., A.

7. Count and Reck. Idem AG Stewart and others, Hood's Trustees, *p* Patton, Neaves, et J. A. Wood. Storie and Baillie, L. Mackintosh, and Gordon, Stuart & Cheyne, A.

#### SECOND DIVISION.

8. Red. MacNaughton or Suttie and Husband, AG MacNaughton or MacNicol, and others, per roll, *p* Sandford et Macfarlane. D. Fisher and C. Fisher, A.

9. Adv. Wight AG Brown and others, per roll, *p* G. G. Bell et Marshall. R. Deuchar and Gibson-Craigs, Dalziel & Brodie, A.

And so with the cases enrolled before the other Lords Ordinary.

the summons, &c.; A.S. 11 July 1828, § 34. The clerk then marks on the summons, letters, or note furnished to him, the date of enrolment, and his initials, and it is irregular for him to mark the summons without enrolling it, and he may be complained upon, although no special injury can be instructed to have arisen from the irregularity, *Bryson v. Burnet and Jeffray*, 18 Dec. 1813, F. C. "No cause shall be enrolled earlier than on the second lawful day after it shall have been called, unless special leave shall be given by the inner-house"; A. S. 11 July 1828, § 29.

In case of Saturday being a holiday, or becoming otherwise vacant, the rolls are ordered to be taken up on the Friday preceding; A. S. 26 Jan. 1768. The rolls are also ordered to be taken up on the last Saturday immediately preceding the meeting of the court, after the adjournment at Christmas; A. S. 24 Dec. 1763. After the spring and autumn vacation, the outer-house rolls are taken up on the Saturday preceding the meeting of the court, if the court meet on Thursday, or any prior day of the week, but not if it meets only on Friday or Saturday; see *i. Ivory*, 150.

These outer-house rolls are printed weekly, A. S. 11 Mar. 1789; and distributed to the agents each Monday, and those at the end of the session are put up daily in MS. and printed when the court rises. See *supra*, p. 116.

## SECT. II.—HAND ROLLS.

The hand rolls of the Lords Ordinary are divided into motion rolls and debate rolls. When a cause has once appeared in the printed roll, all the subsequent proceedings for getting in papers, obtaining a diligence, and motions of every kind, are carried on by enrolments in the hand roll. These rolls must be put up in the Parliament House at twelve o'clock noon, two days before the roll is to be called, A. S. 11 Aug. 1787, § 9; and if it is to be called on Tuesday,

the roll must be put up the Saturday before, at twelve o'clock, *Ibid.* These rolls never contain the Christian names, or designations of the parties, or the names of the agents.<sup>1</sup> A note is generally furnished to the clerk who enrols the case.<sup>2</sup> The enrolment is made by the clerk to the Lord Ordinary before whom the cause depends, who attends from eleven to twelve in the clerk's room, in the lobby of the Parliament House, on the enrolling days; and due intimation of the enrolment must be given to the opposite party the same day, by putting the notice in the Post Office, or otherwise.

When the record in jury causes is ready to be closed, and issues are to be prepared, such causes shall be transmitted by the depute assistant clerk to the jury office, and the assistant jury clerks now officiating, (so long as they remain in office), shall attend at the calling of such notices in jury causes as shall be enrolled by the parties before the Lord Ordinary; the roll of such causes being called by the Lord Ordinary after the motions are heard, and before entering on the causes in the debate roll,—and the notices for motions in jury causes, in this stage, shall be lodged as heretofore in the Jury office," § 8; *supra*, p. 107.<sup>3</sup> The regu-

<sup>1</sup> The Agents' names have latterly been added to the *Debate* Rolls.

<sup>2</sup> The note or slip given to the clerk who takes up the motion roll is in such a form as this:—LORD ROBERTSON—Tuesday, A. v. B., p. C. and D.

<sup>3</sup> The following is the mode in which the Motion Rolls are put out:—

*Tuesday, 8 February 1848.*

#### OUTER-HOUSE HAND-ROLLS.

LORD CUNINGHAME.—MR. BEVERIDGE, *Clerk*.

##### JURY CAUSES.

Eddie & Addie v. Hills, p. Penney et Cook.

Carrick v. Saunders, &c., p. Penney et Inglis.

Robertson's Trs. v. Ure, p. Cowan et Deas.

lation that the jury causes shall be called after the motion roll, is not rigidly observed in practice. The rolls are called in the order which is found most convenient.

The Debate Roll requires no explanation. We shall afterwards consider what is necessary to be done before a cause can be put to the Debate Roll ;<sup>1</sup> *infra*, P. iii. 5. 2.

MOTIONS, *after* PRINTED ROLL, at 9 o'Clock.

1. Duffin *v.* Bruce, p. Cowan et Macfarlane.
2. Edwards *v.* Wilson, &c., p. Cowan, A. Anderson, Fraser, et D. Mackenzie.
3. Conjd. Adv.—Dundee Orphan Instn., &c. *v.* Pennycook, p. Baillie, &c., &c.
4. R. & S.—Barharrow, p. Moncreiff et Horn.
5. MP. Thomson's Trs. *v.* Thomson, &c., p. Marshall, Moncreiff, et Neaves.
6. Conjd. Acts.—Aimer *v.* Smith & Rennison, p. Cowan et Mackenzie.
7. Adv.—Boase *v.* Pennycook, p. Milne, Pattison, &c.
8. C. & R.—Duncan's Exers. *v.* Lockhart, p. Cowan.
9. Sloan *v.* Sloan, p. T. Mackenzie et Handyside.
10. Red.—Murray (Curle's Cur.) *v.* Cheves & Laurence, p. Macfarlane et P. Fraser.

*By order of the Lord Ordinary.*

11. Carswell *v.* Steele, p. Horn, T. Mackenzie, Penney, Neaves, et G. Bell.

<sup>1</sup> The form of the Debate Roll will be seen from the following specimen :—

LORD WOOD'S DEBATES.

1. Ronaldsons *v.* Sinclairs, p. Mackenzie et Buchanan.  
*Agents*, Dickson & Steuart—Chas. Buchanan.
2. Mowbray *v.* Dickson, p. Patton et Deas.  
*Agents*, S. & P. S. Beveridge—Wm. Traquair.
3. Read's Trs. *v.* Milne, Cruden & Co., p. J. M. Bell et Cowan.  
*Agents*, A. & C. Douglas—Jas. Ross.
4. Macpherson *v.* Macpherson, p. Penney, Craufurd, et Thomson.  
*Agents*, Gibson-Craigs, Dalziel & Brodie—J. Meiklejohn.

The hand rolls of the Lords Ordinary, as well as the daily rolls of the inner-house, are now printed, and distributed among those members of the profession who choose to pay for them. The outer-house rolls of new causes, described in last section, which, since the passing of the A. S. 11 Mar. 1789, there referred to, have been generally termed "the printed rolls," are now, to avoid confusion, frequently called "the Weekly Printed Rolls," or "Weekly Rolls."

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*N.B.—The above four Cases partly heard.*

5. Heritors of Dalkeith v. Tarbet, p. Inglis, et Deas.  
*Agents, J. R. Calvert—Lothians & Finlay.*
6. Cleland's Exors. v. Cleland, p. Penney, et Moncreiff.  
*Agents, Clason & Clark—W. Lorimer.*
7. Hamilton v. Johnstone's Trs., p. Moncreiff, et Marshall.  
*Agents, W. Waddel—J. Hamilton.*
8. Stewart v. Stewart's Trs., p. Cowan, et Patton.  
*Agents, J. S. Ducat—J. L. Hill.*

### **PART III.**

**OF THE PROCEDURE IN ORDINARY ACTIONS, IN  
ADMIRALTY AND CONSISTORIAL ACTIONS, AND  
IN SUSPENSIONS AND ADVOCATIONS, IN THE  
OUTER-HOUSE.**





## PART III.

### OF THE PROCEDURE IN ORDINARY ACTIONS, IN ADMIRALTY AND CONSISTORIAL ACTIONS, AND IN SUSPENSIONS AND ADVOCATIONS, IN THE OUTER HOUSE.

#### CHAPTER I.

##### OF PROCEEDINGS IN ABSENCE.

###### SECT. I.—PROCEDURE WHERE NO APPEARANCE.

WHEN the cause is called in the course of the weekly roll, the Lord Ordinary “may, on the application of a party who has not been permitted to borrow the process before lodging defences or answers, and on cause shewn, allow his agent to borrow the same, and allow defences or answers to be lodged within a reasonable time thereafter,” A. S. 11 July 1828, § 32; but in general, if, at the calling before the Ordinary, defences or answers “have not been lodged as required,” decree is pronounced in favour of the pursuer,<sup>1</sup> &c.; *Ibid.* § 45.<sup>2</sup> His agent will then lodge his account of expenses;

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<sup>1</sup> “Act. B.—*Alt. Absent.*—Decerns against the defender in absence, conform to the conclusions of the libel, with expenses, as the same shall be taxed by the auditor.”

<sup>2</sup> Some practical points, with reference to decrees in absence, may be here noticed. (1.) In a *first* adjudication, an order for intimation must precede decree, (*infra*, P. iv. 9. 15). After expiry of the days of intimation, the Lord Ordinary will be craved to “*adjudge*.” (See the cases where warrant for infestment will not be asked for, *infra*, P. iv. 9. 15, *in fin.*) (2.) As to decrees in absence in *Reductions*, see *infra*, P. iv. 8. 8. and 11. (3.) In *Consistorial* actions generally, (*infra*, P. iii. 11. n. 1.) the pursuer must prove the case, before getting decree, though the defender does not appear. (4.) Where there are *alternative* conclusions in a libel, the decree should be made to bear reference to one or other of them; if

and after having it taxed by the auditor, he may extract the decree when it has been read in the minute book for the proper time, (nine days). No decree for expenses can now be extracted until the account has been audited; but when decree in absence has been pronounced, it is unnecessary to enrol the case before the Lord Ordinary, to have the auditor's report approved of; 1 and 2 Geo. IV. c. 38, (28 May 1821), § 33. If the pursuer chooses to pass from his expenses, he may have the principal decree extracted, on giving written authority to the Extractor. See Bev. 630; *M'Lachlan v. Campbell*, 28 Feb. 1846, viii. D. 574.

As a matter of favour, a pursuer frequently consents to allow defences to be received, produced for the first time at the bar, when the case is called in the list of undefended causes. This is by no means a safe proceeding for a pursuer. Suppose, in such circumstances, that there is an insuperable preliminary defence stated; the pursuer, if he had seen the defences before enrolling, as he is entitled to do, might have refrained from proceeding, and the defender could then have recovered the protestation money only (*supra*, p. 279). But in the case supposed, matters are now in a different position, as the cause has been enrolled, and the pursuer, if the action is cast, will be subjected in payment of the defender's expenses. It is, however, generally understood, that if a pursuer enrolling, intimate his intention, in such circumstances, of falling from his enrolment, before an interlocutor

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taken generally, "in terms of the libel," as is often done by mistake, it cannot be extracted, without a signed minute given by the pursuer's agent to the principal Extractor, consenting to limit the decree to one of the alternatives. (5.) Where expenses are concluded for, if the defender "shall appear and oppose," as is usual in summonses of *Constitution*, it is quite irregular to take decree in absence for expenses, as is often done. (6.) A *Supplementary* Summons should be conjoined with the leading action before decree in absence is taken. This is frequently overlooked.

is pronounced in the cause, (*e. g.* an interlocutor allowing the defences to be received), he is entitled to do so, and the defender can only proceed by protestation, as if the pursuer had not enrolled. When a defender has preliminary defences, the plan is sometimes resorted to, of allowing decree to go in absence. After being reponed, at a trifling cost, (*next Section*), the defence will be discussed, and if sustained, he may recover the whole expenses of the defence, instead of the protestation money only.

SECT. II.—OF REPONING AGAINST DECREE IN ABSENCE, &c.

If the defender, charger, &c. wishes to be reponed against the decree in absence,<sup>1</sup> then he ought to borrow the process before the time elapses when it may be extracted, and he may keep it for twenty-one days; but it may then be forced back and extracted. To prevent this being done, "he may apply to the inner-house, by a short note, before extract, accompanied with the defences, or other paper required, merely setting forth the interlocutor, or decree, when the court shall remit to the Lord Ordinary to repon the party, on payment of such expenses as to his Lordship may seem reasonable, who shall thereafter prepare and proceed in the cause as accords; and all after proceedings and interlocutors shall be held to be *in foro*, and be conclusive accordingly;" A. S. 11 July 1828, § 72. The application must be made in the form of a reclaiming note, and not of a petition, and it is unnecessary to deliver copies of it, or to intimate its being lodged to the opposite party, *Williams, Foster and Co. v. M'George*, 2 Feb. 1832,

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<sup>1</sup> The expression, "a decree in absence," is technical, and is only used when no appearance has been made in the process by the defender, &c. It must not be confounded with a decree by default (*infra*, P. v. 11) to comply with orders in process, as to lodging papers, &c., pronounced, it may be, when the party is not present.

x. S. 283. A party may be reponed after expiry of the twenty-one days, if before extract, *Scottish Union Insurance Co. v. Calderwoods*, 8 July 1836, xiv. S. 1114. See *Clyne v. Reid*, 5 July 1828, vi. S. 1085, Note; *Lumsdaine v. Australian Co. and Brown*, 18 Dec. 1834, xiii. S. 215. In modifying these expenses, the expense of raising and executing the summons, and calling and enrolling the cause, is not to be given, as it still remains an available document, *Eyre v. Skinner's Tre.*, 22 Dec. 1825, iv. S. 332, (N. E. 337); *Campbell v. Wilson and McIntyre*, (a suspension), 27 Jan. 1826, iv. S. 398, (N. E. 400); and where the summons includes several defenders, and one of them applies to be reponed, he is only liable for a proportion of the expense, *Paterson v. Murray*, 2 Feb. 1828, vi. S. 478. The expenses awarded by the Lord Ordinary seldom exceed two guineas, and occasionally none are given, *Baillie v. Baillie*, 15 Jan. 1830, viii. S. 318; *Johnston v. Eldler*, 17 Jan. 1832, x. S. 195. Where judgment had passed in absence of a defender resident abroad, and cited to an action of declarator of marriage, raised in virtue of an arrestment *jur. fund. c.*, the court, while allowing him to be reponed, refused to reserve the question of expenses, although he disputed the jurisdiction, but remitted to the Lord Ordinary to repon, on payment of such expenses as he might see fit, *Brackenridge, &c. v. Kenneth*, 30 May 1834, xii. S. 654. Although a party has previously been reponed against a decree in absence, he may still be reponed against a decree by default, *Cruickshanks v. Mackay or Ewing*, 18 July 1845, vii. D. 1084.

By § 5 of the Advocation and Suspension Act, 1 and 2 Vict. c. 86, (10 Aug. 1838), a party may now bring a suspension of any decree in absence, by lodging in the bill-chamber a note of suspension, in the same form as in suspensions of decrees *in foro* of inferior courts; and upon consignation with the clerk, of such expenses as may have been decerned for, the note of suspension shall be received

and marked by the clerks in the bill-chamber, and shall be laid before the Lord Ordinary on the Bills, and shall be passed; and the Lord Ordinary shall have power to award to the pursuer such part of the expenses consigned as may appear to be just; and such note of suspension and interlocutor passing the same, shall be served on the opposite party by a messenger-at-arms in common form, and it shall be competent, after the lapse of fifteen days from the date of service, to call, and thereafter to enrol the cause before the judge who pronounced the original decree, or his successor, and to proceed therein in common form, without prejudice to the court, on cause shewn, to remit the same to any other Lord Ordinary; and the Lord Ordinary before whom such cause shall come, may grant warrant to transmit the original proceedings to the clerk to such cause.<sup>1</sup>

In *Downie v. Peebles*, 27 Nov. 1841, iv. D. 117, it was held that the rule as to consignment of expenses in this section of the statute, did not apply to a suspender who, from the action not having been called against him, had not been regularly made a party to it, and that he was entitled to suspend *simpliciter*.

When a party allows a decree in absence to pass against him, it is a question of circumstances whether he will be permitted to insist in a reduction of it, without paying the

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<sup>1</sup> When the case appears in the weekly roll, such an interlocutor as the following will be pronounced:—

“ Grants warrant to, authorizes and ordains the keeper of the judicial records, custodiers of the original process, being the grounds and warrants of the decree under suspension, to transmit the same forthwith to the clerk to this process.”

This having been done,—the Lord Ordinary may order the case to be proceeded with by this or a similar order: “ Under a reservation of all questions of expenses, opens up the decree in absence, and allows defences for E. F. to be lodged by next calling.”

expenses of the decree, *Smyth v. Nisbet*, 9 Mar. 1826, iv. S. 538, (N. E. 546); *Cameron v. Chapman and Mand.*, 7 July 1835, xiii. S. 1047; *Dutch v. Webster*, 26 Nov. 1835, xiv. S. 68; *Dewar, &c. v. Cruickshank, &c.*, 23 June 1842, iv. D. 1446.

The reponing of paupers is regulated by the Act of Sedes-runt, 11 July 1828. By § 73 it is declared, "that although the party against whom decreet in absence, or upon failure, has been pronounced, shall be on the poor's roll, he shall not be reponed without payment of expenses, as above provided, unless it shall appear, upon investigation, that the decree so pronounced, has gone out from the inability of the party to furnish the necessary information, and not from the fault or neglect of the agent in the cause, or the wilful neglect of the pauper himself." See next Sect., *in fin.*

On a mere application to be reponed, it is not competent to enter into the consideration of how far the party may have been barred, by intervening circumstances, from insisting in his defence, *Spence v. Hoe*, 15 Jan. 1831, ix. S. 282. A petition to be reponed against an inner house interlocutor in absence, is incompetent, *Toughs v. Smith*, 5 June 1832, x. S. 619. By § 20 of the Transference of Lands' Act, 10 and 11 Vict. c. 48, (25 June 1847), it is declared that any judgment of the Lord Ordinary pronounced in virtue of the act, if not brought under review in ordinary form, shall be final, whether pronounced in absence of the respondent or not, and shall not be subject to review by appeal, reduction, or any other mode.

Before the statute of 1838, (*supra*), when a party allowed the decree against him to be extracted and then suspended, he was generally obliged to pay the previous expenses before the bill was passed, *Paterson v. Murray*, 8 Dec. 1827, vi. S. 226, and same parties, *supra*, p. 308; *Cowie v. Murray*, 18 Nov. 1828, vii. S. 23.

## SECT. III.—DECREE WHEN TO BE HELD IN ABSENCE.

It is often a matter of doubt whether a decree be in absence or *in foro*, and as the means of obtaining relief are very different, it is important to ascertain the point. When decrees were extracted *ad longum*, an error in stating the decree to be in absence, when it was in reality *in foro*, was even held a nullity; *Adjudgers of Falahill v. Cunningham*, 27 Jan. 1736, M. 12,185. Now, the rule laid down by 1672, c. 16, (c. 40. *Regulation of Judicatories*, Th. Ed. viii. 80), § 19, is sufficiently clear, in general, that “where there is once compearance for any party, and *defences proponed*, the decreit shall be holdin as done *in foro*, and all the dispute proponed by the advocat shall be insert therein, albeit the advocat theraftir past from his compearance.” When an action has been raised against a minor having curators, and defences have been given in for the former, but not for the latter, the decree is to be considered as in absence, *Anderson v. Ferguson*, 11 July 1828, vi. S. 1145; but if the pupil and one tutor have appeared, it would seem to be *in foro*, even in a question with a tutor who has not appeared; *Wallace v. Anderson*, 21 Dec. 1826, v. S. 179, (N. E. 165). The defences here meant are peremptory; for where the party proponed only dilatory defences, the decree was still held in absence; *Stair*, iv. 40. 8, and iv. 46. 10; *Bankt.* iv. 36. 6; *Tait’s MS.* “Procedure where pursuer present,—defender absent;” *New Form of Process*, (2d Ed. 1799), 64. But this is now seldom of consequence in this question, as, by our present forms, all the defences, both dilatory and peremptory, except in reductions, must be stated at once; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 2, &c.

The above rule has been pretty closely adhered to in practice. Thus, where defences have been lodged, the decree



is still *in foro*, though they may not have been insisted in, *Sandilands v. Burnet*, 16 Nov. 1711, M. 12,236; and a party who compares in a process, and propones peremptory defences, cannot withdraw his appearance, at least any decree pronounced against him will be *in foro*; *Bruce v. Carstairs*, 15 Dec. 1773, v. Sup. 458. But where, during the dependence, the defender dies, and decree is pronounced in favour of the pursuer on the heir's renunciation, this is not a decree *in foro*, in a question with the trustees of the deceased; *Gouldie v. Heirs and Tr. of Murray*, 12 Dec. 1752, Elchies, *Process*, No. 25. In summary applications, the giving in of pleadings has been held sufficient to entitle the Court to judge on the merits, though one of the parties was absent at the advising, *Kennedy and Jeffrey v. Watson*, 29 June 1825, iv. S. 125, (N. E. 127.) On the other hand, a decree of suspension was found not to be *in foro*, though there was appearance for the suspender, and the suspension was produced, but no debate took place, and although the suspender gave in a petition, but not on the merits, which was refused; *Chirurgeons and Apothecaries of Glasgow v. Reid*, 17 Dec. 1701, M. 12,193. Neither was a decree held to be *in foro*, where an advocate appeared for the party, and stated he had nothing to object against the decree; *Reprs. of Smith v. Semple*, 14 Dec. 1711, M. 12,194. Where a decree was pronounced in absence, representations (under the old system) merely to be reponed against it, in order to be heard,—but the party not being heard,—did not make it a decree *in foro*, *Ann Boyd, Petr.*, 21 July 1772, Tait's M.S., "Procedure, pursuer present,—defender absent," and v. Sup. 425. The decree was found to be still in absence, though the summons had been taken out to see, an order for defences pronounced, and a short representation presented to the Lord Ordinary, under the old form; *Young v. Mitchell*, 10 Feb. 1803, M. 12,178. Even a representation on the merits, if not supported, was

not held to make the decree *in foro*, *Crawford v. Baird and Lauder*, July 1772, v. Sup. 425; Tait's M.S., *ubi supra*; but in another case, *Ballenden v. D. of Argyle*, 2 March 1791, Bell's 8vo. Cases, 157, two representations on the merits, though not supported, were held to make the decree *in foro*.

After a final decree in a multiplepinding has been pronounced and implemented, though not extracted, it is incompetent for a party to be reponed, as against a decree in absence. *M'Intyre's Trs. v. Collins, &c.*, 28 Nov. 1834, xiii. S. 101.

Where a defender not only took out a summons to see, but the pursuer, on an agreement with him, restricted the conclusions, and a joint minute, signed by the counsel and agents of both parties, to waken the process of consent, was lodged, and the defender attended at the taxing of certain accounts pursued for, lodged objections to them, and was heard by his counsel at the bar on the objections,—these circumstances were held to preclude the plea that the decree was in absence; *M'Donald v. M'Kenzie*, 13 Nov. 1822, ii. S. 4, (N. E. 3). See two other special cases, *Roy v. E. of Wemyss*, 7 July 1840, ii. D. 1345; *Downie v. Peebles*, 27 Nov. 1841, iv. D. 117. A party may be bound by proceedings as *in foro*, though he may have given no express warrant to appear for him, if he do not disclaim the proceedings when he is aware of them; but the agent who thus unwarrantably makes appearance will be liable in the damages incurred. No redress, however, lies against the counsel, as it is a sufficient defence to him that he was employed by a practising agent; *Wallace v. Miller*, 31 May 1821, i. S. 40, (N. E. 43). Where compearance is made by an advocate, the party cannot be allowed to prove he has not given him authority, in a question with the pursuer; leaving him to obtain his relief against the agent, *Ballantyne v. Edgar*, 7 Dec.

1676, M. 348; *Grant v. Mackenzie*, 11 Dec. 1678, ii. Sup. 237; *Maxwell v. Chalmers*, 1 Dec. 1750, M. 12,042, Bankt. i. 18. 7. and iv. 3. 26; Tait's MS. *ubi supra*. See also *Millar v. Gibson-Craig, &c.*, 29 Nov. 1826, v. S. 52, (N. E. 49). In the case of *Hamilton, &c. v. Marshalls*, 25 Nov. 1813, F. C. and Hume, 497, it was found, that the allegation of a party, that the counsel and agent were not authorized to enter appearance for him, was not a ground for suspending a decree *in foro*, and that the allegation, if at all relevant, must be substantiated in a reduction. See the question discussed how far the presumption of a mandate in favour of an advocate will bind the party, who has given no authority to appear, *Cowan, &c. v. Farnie, &c.* 4 Mar. 1836, xiv. S. 634. See *supra*, P. i. 3. B. 4; and P. ii. 1. 7, *in init.* The question, when decrees of reduction are to be held as *in foro*, is considered afterwards, in treating of the action of reduction, (*infra* P. iv. 8. 9 and 11).

In cases of reduction of decrees of the Court of Session, which cannot, in general, be proceeded with, where the ground insisted on is either competent and omitted, or proposed and repelled, an exception is received where the decree has been pronounced against the pursuer, in consequence of his inability, through poverty, to carry on his case, *Millie v. Millie*, 27 Nov. 1801, M. 12,176, affirmed on appeal, 18 Mar. 1807, F. C. xv. (1808-10), 752; *Leiths v. Leith*, 7 June 1822, i. S. 506, (N. E. 435); *Clark v. Neumarch and Grant*, 17 Nov. 1825, iv. S. 182, (N. E. 184); *Steel v. Black, &c.* 23 May 1829, vii. S. 648; *Sassen v. Campbell*, 20 Nov. 1829, viii. S. 102, *Paterson v. Burke*, 6 Mar. 1844, vi. D. 953; but a suspension of the decree is, in such circumstances, incompetent; *Ibid.* and *Steel, supra*. See last sect. p. 310.

## SECT. IV.—EFFECT OF DECREE IN ABSENCE.

The effect of a decree in absence, when attempted to be set aside after the defender's death, and where there is no other evidence of the debt, depends upon the manner in which the citation has been given. If the defender have been cited personally, the decree is effectual, and cannot be opened up, *Blair v. Common Agent in Sale of Kinloch*, 23 July 1789, M. 12,196; but not otherwise, *M'Donald v. Common Agent in Sale of Kinloch*, 4 Feb. 1790, M. 12,198. Where, however, it is impossible to cite the defender personally, as where he is out of the kingdom, an edictal citation is equivalent, *M'Kewar v. Vernor*, 20 June 1673, M. 12,031; *Kinloch v. Forbes*, 3 July 1704, M. 12,038; *Buchanan v. Logie*, 4 July 1676, M. 12,034. Where a decree is challenged, after the lapse of many years, the presumption is that the defender was personally cited; *M'Kenzie v. Grant*, 26 Jan. 1675, ii. Sup. 182. If the defender, though not cited personally, has had sufficient opportunity to object to the proceedings without doing so, a decree in absence will also be held good evidence of the debt, after his death; *Trs. of Sutherland v. Lockhart, &c.*, 4 Feb. 1790, M. 12,200.

Where a pursuer, instead of simply taking a decree, leads a proof of his libel, "which it is competent for him to do where a proof is necessary," *New Form of Process*, (2 Ed. 1799), 64, the decree obtained is, of course, still in absence. On the other hand, a decree of absolvitor, pronounced in absence of the defender, is considered a decree *in foro*, *Ersk. iv. 3. 6*; *Craik v. Craik*, 29 Jan. 1735, M. 12,195; affirmed on appeal, 21 May 1753, M. Supp. Vol. Appeals, 63; *Tait's MS.* "Procedure, pursuer present,—defender absent."<sup>1</sup>

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<sup>1</sup> "A decree in absence on a Complaint, where facts criminal are charged, would be good for nothing. And indeed, decreets in absence are only in

## CHAPTER II.

## OF THE DISPOSAL OF THE PRELIMINARY (DILATORY) DEFENCES.

## SECT. I.—PROCEDURE.

LET us now suppose that defences are lodged. Then, if there are preliminary or dilatory defences, these must first be discussed; and it is quite irregular to close the record, and then discuss them, unless they require probation, or have been reserved, as affecting the merits, *Campbell v. Macdonell*, 22 Feb. 1827, v. S. 412; (N. E. 391); *Macdonald v. Mackintosh*, 1 Dec. 1830, ix. S. 104; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 5. If the action be dismissed on the dilatory defences, the Lord Ordinary will also determine the matter of expenses; but if the dilatory defences be repelled, no decision shall be given as to expenses, unless the defender give notice that he is to bring the Lord Ordinary's judgment under the review of the inner-house; and then, before proceeding with the preparation of the cause, expenses must be given against the defender.<sup>1</sup> If no notice, however, be given of the intention to bring the interlocutor under review, it is incompetent to award expenses at this period of the cause; *Steel v. Steel and Buchanan*, 4 Mar. 1826, iv. S. 527, (N. E. 535.) A party may reclaim, although he has not intimated his intention so to do, *M'Laurin v.*

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practice in the outer-house. In the inner-house, where the pursuer always opens his libel, they ought not to be allowed. In complaints they never are—a proof is always granted." Tait's MS. *ubi supra*.

<sup>1</sup> "Having heard parties procurators upon the preliminary defences, repels the same and decerns; and in respect the defender now gives notice of his intention to bring this judgment under review, finds him liable to the pursuer in the expenses of this preliminary discussion, and remits," &c.

*M'Gregor*, 29 May 1845, vii. D. 744. Where notice is given, and the defender does not reclaim within twenty-one days, the decree for expenses, and the expense of extract, will be allowed to go out as interim. The court, in reviewing the judgment, must dispose of the question of expenses, at the same time, as well as of those incurred in the Inner-house; and, if awarded, an interim decree will be given. Where the action is not dismissed, no appeal can be taken to the House of Peers, without leave from the court; but the effect of the defence is reserved, should the case be appealed after a final decision on the merits; 6 Geo. IV. c. 120, § 5. Where a defence is, at the same time, dilatory and also on the merits, the Lord Ordinary, when he sustains or repels it, will state that it is disposed of "so far as it is preliminary or dilatory," that the decision may not be supposed to be on the merits, *Lourey or Maxwell v. Donald and King*, 3 Dec. 1831, x. S. 98.

SECT. II.—DISTINCTION BETWEEN DILATORY AND  
PEREMPTORY DEFENCES.

There is often considerable difficulty in determining whether a defence be dilatory or peremptory. Dilatory defences may be defined to be such as merely affect the particular instance, leaving the cause of action entire, and the pursuer at liberty to insist in a new action. Objections to the form of the summons,—that all parties having interest are not called,—that the action is raised *intra annum deliberandi*,—are dilatory defences. On the other hand, a defence which goes into the merits of the action, *quæ perimit causam*,—as payment, compensation, prescription,—is peremptory, *Stair*, iv. 39. 13, &c., and iv. 40. 15; *Bankt.* iv. 25. 2, &c.; *Ersk.* iv. 1. 66, &c. Among peremptory defences, may be reckoned the objection to a reduction proceeding on an adjudication, that the wrong person has been charged as heir, *Keiths v. Burnet*, 6 Dec. 1693,

M. 12,069; the objection to an action by a widow, for what she is entitled to, *jure relictæ*, that there are no free funds, *Munro v. Tod*, 22 May 1829, vii. S. 648; an allegation that the subject matter is under submission, *Macdonald, &c. v. Lord Macdonald*, 16 June 1829, vii. S. 765; although it has been held that the defence to an action founded on a contract of copartnery, that, by the contract, all disputes were to be submitted to a person named, was a dilatory defence, *Laidlaw v. Dunlop*, 11 Mar. 1831, ix. S. 579. As to the disposal of objections to the competency of *Multiplepointings*, see *infra* P. iv. 6. 5, and of *Advocations and Suspensions*, P. iii. 12. 5, *in fin.*

The defence of falsehood against the execution of a summons, though of the nature of a dilatory defence, can only be received *peremptorie causæ*, as a peremptory defence, *Elections of Wick*, Mar. 1773, v. Sup. 457; *supra* p. 258. If the defender fail in the proof of falsehood, he is cut off from any defence against the ground of action; Bankt. iv. 25. 3. This penal consequence has been introduced, to prevent attempts to create delay, *Hamilton and Baird v. Hunter*, 23 Nov. 1743, M. 6772. The pursuer prevails in every conclusion of his libel that requires no other party than the defender to be called, and which it is not *pars judicis* to overrule, as contrary to law, *Knox and Others*, 10 July 1741, M. 6782; *M<sup>c</sup>Kenzie*, 21 Nov. 1712, M. 6770. The defender will, however, be allowed "to propone and insist in his other defences; and the exception of falsehood against the execution, will be reserved to the last place;" Bankt. i. 10. 217;<sup>1</sup> see *supra* p. 289, and *infra* P. iv. 8. 13.

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<sup>1</sup> If a dilator is proponed *peremptorie causæ*, i. e. if the defender puts the issue of the cause upon it,—it ceases to be a dilator, and becomes a peremptor,—nay, more than a common peremptor, for if the defender fails in proof of it, he cannot recur to other peremptors, but is concluded; that is, decree will go against him, not conform to the conclusions of the libel, in every case, for if these are against law, it is *pars judicis* to guard against

## SECT. III.—WHERE DILATORY DEFENCE IS NOT DISPOSED OF.

When a dilatory defence has neither been repelled nor expressly reserved, but has been repeated among the pleas in law, and the record closed on the merits, it is held to be reserved, *Johnstone v. Arnotts*, 23 Jan. 1830, viii. S. 383; *King's Advocate v. Lord Douglas*, 24 Dec. 1836, xv. S. 314.

Although it may be in some cases proper to reserve the dilatory defences, it is the interest of the pursuer to see that they are disposed of; because, after great delay and expense have been incurred in discussing the merits of the cause, and though he may be successful in this discussion, he may lose the case on the dilatory defences; and, in such circumstances, he may be competently found liable not only in the expense occasioned by the defence, but the whole expenses incurred in making up the record, *Dickie v. Gutzmer*, 27 Feb. 1828, vi. S. 637; *Hopkirk v. Geddes*, note, *ibid.* See *M'Kenzie v. Hunter*, 13 Feb. 1830, viii. S. 526.

A party deponing on a reference to his oath, without reserving his preliminary defences, will be held to have passed from them, *Turnbull v. Borthwick*, 12 May 1830, viii. S. 735. See *infra* P. iii. 9. 2.

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 CHAPTER III.

## OF THE EXAMINATION OF SUMMONS AND DEFENCES.

WHERE there are no dilatory defences, or where they have been repelled, the Lord Ordinary then examines the

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them, but decret will go and be pronounced against him, in the same way as it would have been, had the case been litigated in the ordinary way, and his defences overruled. Tait's MS. "Procedure where both parties are present."



correctness of the summons and peremptory defences. If the grounds of action, as set forth in the summons, are not in terms sufficiently positive and clear, or the conclusion not regularly or legally deduced, he may either dismiss the action, decerning for expenses, and reserving to the pursuer the right to bring a new action, or order an amendment of the libel, and give interim decree against the pursuer for expenses occasioned by the incorrect form of the summons. If, on the other hand, the defender has not set forth his peremptory defences or exceptions in terms sufficient in point of fact, and with due correctness in point of law, the Lord Ordinary may order defences more correct and satisfactory to be given in, and give decree against the defender for the expense occasioned by his imperfect or evasive defences. When the amended summons or additional defences are lodged, the expenses must be paid over to the clerk for behoof of the party, without which the paper shall not be received. The judgment of the Ordinary is of course subject to the review of the inner-house by reclaiming note within twenty-one days; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 6. "When the Lord Ordinary sees cause, in virtue of the 6th section of the statute, to order an amendment of the libel, or new or additional defences, and such paper shall not be given in within the time fixed, the Lord Ordinary shall pronounce such judgment as the opposite party may crave, not being inconsistent with the shape and nature of the cause; and in like manner, when amended, or additional reasons of advocacy or suspension, or answers, have been ordered, and have not been given in within the time fixed, the Lord Ordinary shall pronounce a similar judgment against the party who has not obtempered the order;" A. S. 11 July 1828, § 56. Where the alteration required on the defence is but slight, it may be made on the margin; and

where there has been an amendment of the libel which may be met in the defences by the addition of a few words on the margin, the expense of new defences will not be allowed; *Fleming v. Hill*, *§c.*, 20 Feb. 1830, viii. S. 584. The time for discussing the dilatory defences, or the correctness of the summons and peremptory defences, is when the case is first called in the Printed (Weekly) roll.

"Where the Lord Ordinary shall be satisfied that the summons and defences are, in point of fact, sufficiently explicit, and correctly deduced in point of law, and that no farther disclosure of facts or of pleas is necessary for the due preparation of the cause for trial, he shall require the parties to state positively, whether they are willing to hold the summons and defences as containing their full and final statement of facts and pleas in law; and if they agree so to do, then the clerk shall set forth in a minute their assent to that effect, which shall be signed by the counsel on each side, and the record shall forthwith be completed, as herein after directed," 6 Geo. IV. c. 120, § 7; *infra* P. iii. 5. 1; before closing the record in this way, the process is rarely sent to *avizandum*.

It seldom happens that the parties are willing to close the record upon the summons and defences; for in general the summons does not set forth with sufficient minuteness and precision the grounds of action, and the statements in the defences generally renders some counter-statements from the pursuer necessary. If this counter-statement, however, be very short, it may be added to the summons as a minute or note,<sup>1</sup> and the record then closed.<sup>2</sup> The Court highly ap-

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<sup>1</sup> "The pursuer consents that the record shall be closed on summons and defences, under a denial by him of the statements and pleas in the defences, so far as inconsistent with the summons."

<sup>2</sup> "The parties agree to hold the summons, defences, and minute, as containing their full and final statement of facts and pleas in law."—"In

prove of this mode of closing the record, where it is practicable; *Marshall v. Philp*, 12 Feb. 1828, vi. S. 515.

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## CHAPTER IV.

### OF THE CONDESCENDENCE AND ANSWERS, AND PLEAS IN LAW.

#### SECT. I.—STATUTORY REGULATION.

“WHERE the parties do not agree to hold the summons and defences as setting forth fully the facts and pleas respectively founded on, or where the Lord Ordinary shall think fit, he shall order<sup>1</sup> the pursuer or defender, as the case may be, to give in, the one a condescendence, the other an answer, or mutual condescendence, setting forth, without argument, the facts which they aver and offer to prove in support of the summons and defences; and in such condescendence, answers, or mutual condescendences, the parties shall, in substantive propositions, and under distinct heads or articles, set forth all facts and circumstances pertinent to the cause of action, or to the defence, and which they respectively allege and offer to prove; and along with such condescendence or answer, or mutual condescendences,

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respect of the foregoing minute, the Lord Ordinary holds the record as closed, and appoints parties procurators to be ready to debate;”—

A minute of authentication is written on both summons and defences. It is subscribed by the Lord Ordinary. It is in these terms: “Authenticates this as part of the record.”

<sup>1</sup> “The Lord Ordinary, appoints the pursuer within                      days to give in a condescendence of the facts he alleges and offers to prove, in support of his action, and the defender to give in answers thereto within                      days thereafter.” If either party allege that a record is unnecessary, this may be minuted, with reference to the ultimate question of expenses.

the parties shall respectively produce all writings in their custody, or within their power, not already produced, on which they mean to found"; 6 Geo. IV. c. 120, § 8.

#### SECT II.—FORM OF.

The form of the condescendence and answers has been the subject of several regulations. The temporary act of sederunt, 11 Mar. 1800, § 1, enacted that they "shall be so framed as to contain no argument or discussion of any kind, nor even any recital of the proceedings; but, taking it for granted that the nature of the cause is already understood, from the libelled summons, defences, and pleadings, shall only state, under distinct heads, or articles, the special facts and circumstances pertinent to the cause, which are alleged and offered to be proved on either side, in order that the same may, as nearly as possible, be brought to a precise issue," &c. Another temporary act of sederunt, 7 Feb. 1810, "declared, in addition to the above regulations, that where a fact is averred by one party, and not explicitly denied by the other party, he shall be held as confessed, in terms of the act of sederunt 1715, § 6, and the fact as definitively proved against him."

The 6th section of the act of sederunt, 1 Feb. 1715, is as follows:—"That any party against whom any matter of fact shall be alleged which might be admitted to probation, the said party, or his advocate, shall be obliged to confess or deny that fact before pronouncing of the interlocutor; which confession or denial respectively shall be expressly marked in the minutes; and if he do refuse so to confess or deny, his refusing shall in like manner be marked in the minutes, whereupon he shall be held as confessed; and if he so deny what shall afterwards, by the probation, appear to have been known to him, the said party shall be obliged to pay all the expenses,

without any modification, which the other party has been put to through his calumnious denial."

The 7th section enacts, "That in all decrees to be extracted hereafter, if the facts therein founded on, in order to infer any alleged relevancy, be not, by the party concerned, expressly denied, the same shall be held as acknowledged, and there shall not, afterwards, be place to object, for any effect whatsoever, that the said facts want probation."

The Commissioners on the form of process, in their report, (1824) p. 6, § 3, "recommended, that in future the strictest attention should be paid by the Lords Ordinary to enforce the provisions of that act of sederunt;" 7 Feb. 1810; "and they have only to suggest, in addition to what is contained therein, and with a view to the attainment of its object, that each fact averred should, instead of being expressed in a loose narrative style, be reduced into the form of a positive and substantive proposition, beginning with a set form of words, such as 'the pursuer or defender avers and offers to prove,' &c. The same observations apply as to the form of the answers." This recommendation has not been adopted.

#### SECT. III.—REVISING OF.

"As soon as the condescendences, or condescendence and answers shall be lodged, the parties shall respectively revise their condescendences and answers,<sup>1</sup> and make such alterations thereon as may appear to them to be necessary, in order fully to meet the opposite averments; and in order that the averments of the parties may be finally adjusted,

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<sup>1</sup> "Appoints parties respectively to revise their condescendence and answers, the revised condescendence to be lodged on or before \_\_\_\_\_, and the revised answers to be lodged within \_\_\_\_\_ days thereafter."

with due regard to the matter of law to be maintained by them respectively, each of the parties shall, along with the copy of his revised condescendence or answer, lodge with the clerk, previous to the final adjustment of the record, a short and concise note, drawn and signed by counsel, of the pleas in law on which the action or defence is to be maintained; and in such notes, the matter of law so to be stated shall be set forth in distinct and separate propositions, without argument, but accompanied by a reference to the authorities relied on;” 6 Geo. IV. c. 120, (*Judic. Act.*, 5 July 1825), § 9. The pleas in law are subjoined to the pleadings, *infra*, p. 331, and authorities are seldom stated.

The act of sederunt, 11 July 1828, § 105, enacts, “ That in all cases the condescendences and answers, and mutual condescendences, as well as revised condescendence and answers, shall be drawn and signed by counsel. That when a party is ordered to give in a condescendence, he shall set forth without argument, in separate and distinct articles, the whole facts which he avers and offers to prove in support of his case, and the respondent, on his part, shall answer each article in such condescendence in their order, and shall distinctly admit or deny in whole or in part, the statements therein contained, without argument or introducing into such answer any counter statement or averment on his part; but in case the respondent shall have such counter statement or averment on his part to make, it shall be competent for him, and he shall be bound to do so under a separate head annexed to his answer, to be intituled, ‘ Respondent’s statement of facts,’ in which he shall, in like manner, without argument, set forth the whole facts which he avers and offers to prove as pertinent to his side of the case. The party who has lodged the condescendence shall then be entitled to revise his paper, and subjoin under a separate head, to be entitled, ‘ Answers to the respondent’s statement of facts,’ an answer to such statements, in their order, by either

admitting or denying the same, in whole or in part; and in case any further counter statment shall become necessary on his part, in consequence of the respondent's statements, the same shall be added in an additional article or articles at the end of his said answers; and the respondent shall be afterwards entitled, in precisely the same manner, to revise his answer and statement of facts, the revised condescendence and answers being each a complete paper, bearing no reference to the original condescendence and answers, except in the case where those original papers require no alteration, or such trifling alterations or additions as can easily be made on the margins of the paper; and when a statement, in point of fact, within the opposite party's knowledge, is averred on the one side, and not denied on the other, he shall be held as confessed." Accordingly, an explicit averment having been made in answers to reasons of suspension, of a fact falling within the knowledge of the suspender, and not denied by him, held to be admitted. *Dunns v. Livingston*, 20 Dec. 1828, vii. S. 218, and in *Drysdale, &c. v. Wood*, 17 Jan. 1832, x. S. 198, an averment upon the record of no possession, not being contradicted, the party was held foreclosed.

It has been held irregular to make up a record upon revised condescendence and answers, defender's statement and answers, and pursuer's counter statement and answers; but that the averments of both parties should be stated in one connected series of averments by the pursuer, with relative answers by the defender, followed, if necessary, by one connected series of averments by the defender, with relative answers by the pursuer; *Allan v. Scott*, 7 June 1832, x. S. 619.

Section 106 enacts, " That in all causes wherever the condescendence and answers, as revised and finally adjusted for the record, shall be printed, this shall be done either in double columns on the same page, so that the answer to each article shall be opposite to the corresponding article of the condescendence, or each answer shall follow and be

subjoined to the article of the condescendence to which it relates." The latter mode is now invariably followed in practice.

SECT. IV.—LODGING OF.

"The Lord Ordinary shall, in every instance, on due consideration of the circumstances, fix the time within which such condescendences and answers shall be lodged, and such time shall not be prorogated, except upon payment of the expenses previously incurred, unless before the elapse of the time so fixed, special application shall be made for such prorogation; nor shall the prorogation in any instance be granted, except on cause shewn, nor oftener than once; and if the party shall fail to lodge his condescendence or answers, as the case may be, within the time originally fixed, or afterwards prorogated, the Lord Ordinary may hold the summons or defences for such party, as his condescendence or answers finally fixing the averments in point of fact on which he founds;" 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 12. Notwithstanding the above enactment, "it shall nevertheless be competent for the Lord Ordinary, on such failure, if it shall appear to him that the summons or defences cannot, with advantage to the due disposal of the cause, be sustained as fixing said averments, to pronounce such judgment as the opposite party may crave, being not inconsistent with the shape and nature of the cause; and, in like manner, on failure to give in the revised condescendence or revised answers, accompanied respectively with notes of pleas in law, within the period fixed by the Lord Ordinary, decree may be given as above, against which, in both cases, the party shall only be reponed by a note to the inner-house within the reclaiming days, producing therewith the paper or papers ordered, and on payment of such expenses as shall be thought reasonable; and in suspensions and advocations, where condescendences and answers have



been ordered, the like procedure shall be observed as nearly as may be, consistently with the form and nature of such process ;" A. S. 11 July 1828, § 57. See *infra*, P. v. c. 11.

#### SECT. V.—PROPER USE OF.

The proper use of a condescendence is, to state more clearly and specifically the grounds of action set forth in the summons, *Scott v. Napier and Others*, 29 Jan. 1829, vii. S. 338. It must support the summons, and may restrict its statements, when too general, *Alison and Others v. Watt*, 24 June 1829, vii. S. 786 ; but new grounds of action cannot be permitted, for these ought to have been brought forward in a different shape, *Dickie v. Gutzmer*, 27 Feb. 1828, vi. S. 637 ; and far less can statements inconsistent with the summons be received, *Ewing's Trs. v. Farquharson*, 25 Feb. 1829, vii. S. 464 ; *Fraser v. Dunbar*, 18 June 1835, xiii. S. 950. Neither can an irrelevant summons be amended by a condescendence, *Kerr v. Kerr*, 16 Dec. 1830, ix. S. 204. Where the facts and law are mixed together, and the condescendence contains argument, it will not be received, *Sproat v. Mure, &c.*, 1 Dec. 1826, v. S. 66, (N. E. 61). Excerpts from proofs, and quotations of interlocutors, are equally out of place, the object of a condescendence being not to aver what is proved, but what is offered to be proved ; and, in such cases, a remit will be made to the Ordinary to prepare the record *de novo*, *Roy, &c. v. Wright, &c.*, 9 Dec. 1826, v. S. 107, (N. E. 98).<sup>1</sup>

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<sup>1</sup> On 6th March 1839, the Lords Ordinary in the outer-house issued a printed notice, in the following terms :—

“ The Lords Ordinary considering that in many instances records have not been prepared according to the true meaning and spirit of the judicature act ;—and having frequently conferred with each other, and ultimately consulted with the Lord President and Judges of the inner-houses ;—and being anxious that the professional persons who practise before

No condescendence should be given in, unless necessary to the decision of the cause. When a condescendence has

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them should be made aware of the views which they have thus come to entertain as to the best remedies for this great inconvenience, have resolved to announce in this form to the profession, the rules according to which they propose, without excluding the exercise of their discretion in extraordinary cases, henceforward and generally to proceed.

"1. That every possible encouragement shall be given to parties to close the record on summonses and defences; and that for this purpose they will allow such minor amendments to be made, both on summonses and defences, (and that without any *interim* award of expenses), as may appear sufficient to protect the just rights of the parties in this proceeding; and that whenever one of the parties is willing to close the record in this manner, and the other party refuses, on grounds which appear to the Lord Ordinary unreasonable, he shall record this fact in the interlocutor appointing the condescendence, (or in a relative note), in order that, if his original impression shall remain when the case comes to be decided on its merits, (whatever that decision may be), the expense of the unnecessary papers may be laid upon the party who insisted for them.

"2. That in framing condescendences and answers, parties shall be required to observe correctly that direction of the judicature act, which ordains them to set forth their averments "*in substantive propositions*," and to abstain from filling these papers with such details as are in truth expositions of evidence, or displays of circumstances, plainly meant to operate as argumentative views of the facts.

"3. That no more shall, in any case, be allowed than one revival *as a matter of course*; and though a second may be generally obtained, upon cause shewn, the expense of it, whenever it is occasioned by one of the parties improperly withholding the true state of his case in the original papers, shall at once be laid on that party; and that after the second, there shall, in no case, be any other revival.

"4. That all quotations from statutes, deeds, correspondence, or other documents—except of a few words or lines to indicate the passages relied on, where this shall be indispensable,—shall be strictly excluded from the condescendence or answers.

"5. That the period of fourteen days each, which is now frequently asked for the preparation or revival of ordinary cases, shall be con-

therefore been ordered, and it is found, when lodged, to be the same paper, in reality, as one already in process, the Lord Ordinary may order the condescendence to be withdrawn, and recall his interlocutor ordering it, *Mowat v. Stewart*, 20 June 1828, vi. S. 1011. It was held, that if a party does not mean to revise his condescendence in a multiplepinding, he must appear when the case is enrolled to close the record, and state that he does not wish to revise it, *Fedie v. Matheson*, 7 Dec. 1826, v. S. 97, (N. E. 90); but without revisal, the pleadings of parties cannot precisely meet each other.

The whole facts to be proved must be set forth in the condescendence and answers, *Mackay v. Macleods*, 12 July 1827, iv. Mur. 281; *Cleland v. Weir*, 21 July 1835, xiii. S. 1143; *Neilson v. Househill Coal and Iron Co.*, 1-7 April 1842, iv. D. 1187. But a sum of damages awarded in an inferior court may be modified in an advocacy, although no special plea of excess be on record, but only that none are due, *Black v. Brown*, 2 Mar. 1827, v. S. 508, (N. E. 478.) No averments contained in the summons or defences, if not repeated in the condescendence and answers, can be taken into view. The summons forms, no doubt, part of the record, but only in as far as regards the conclusions it contains, *Ross v. Hutton and Henderson*, 15 June 1830, viii. S. 916;

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siderably reduced, unless some particular reason shall be stated to justify it.

The Lords Ordinary confidently hope, that in thus attempting to diminish the expense and delay of these preparatory proceedings, and to purify and simplify the records, they will meet with the practical and cordial support of the counsel and agents. At the same time, they think it right to repeat, that, in what has now been stated, they mean merely to intimate the rules and principles upon which they intend to act in ordinary cases; and have no thought of abridging the rights of suitors by any peremptory regulations, or limiting their own discretion, according to the circumstances of peculiar cases. (Signed) JOHN FULLERTON. JAMES W. MONCREIFF. P. JEFFREY. H. COCKBURN. J. CUNNINGHAM.

*Luke, &c. v. Mags. of Edinburgh and Hunter*, 15 Aug. 1832, vi. W. and S. 241. See also *Lowe v. Taylor, &c.*, 24 June 1843, v. D. 1261. Where averments in a condescendence are acquiesced in, they ought to be simply admitted, and not repeated.

SECT. VI.—PLEAS IN LAW.

The Judicature Act, (5 July 1825), § 9, enacts, that “each of the parties shall, along with the copy of his revised condescendence or answers, lodge with the clerk, previous to the final adjustment of the record, a short and concise note, drawn and signed by counsel, of the pleas in law on which the action or defence is to be maintained, and in such notes the matter of law, so to be stated, shall be set forth in distinct and separate propositions, without argument, but accompanied by a reference to the authorities relied on,” (*supra* p. 325).

The act of sederunt, 11 July 1828, § 49, orders, that “a note of pleas, given in as relating to any condescendence or answers, or other paper in process, shall, in every case, with a separate title as such, form the concluding part of the paper to which it relates;” and § 58 enacts, that “the clerk to the process shall in no case receive the revised condescendence or revised answers, unless they be accompanied by notes of pleas in law, as specified in section 9th of the statute.”

The statute, § 10, declares it is the duty of the Lord Ordinary, in adjusting the record, previous to closing, to “suggest any new plea which may to him appear necessary to exhaust the whole disputable matter in law or fact in the cause.”

The Court strictly enforce the rule, that the pleas in law shall be “short and concise,” and “without argument;” *Fraser v. M'Kenzie*, 10 June 1826, iv. S. 699. A dilatory defence, not stated in the defences, will not be allowed to



after closing the record, "either party wish a new plea or ground in law, to be stated on the record, he shall enrol the cause, and furnish the said new plea to the party, forty-eight hours before the enrolment." Previously the party offering the new plea had been held liable in payment of the whole expenses, before the new plea could be received: *Davidson v. Falconer*, 2 June 1827, v. S. 748, (N. E. 699). See *Watson or Stewart v. Edwards or Maconochie, &c.*, 13 Dec. 1834, xiii. S. 196; *Scott v. Dunn*, 13 May 1837, xv. S. 924.

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## CHAPTER V.

### OF CLOSING THE RECORD—DEBATING THE CAUSE —OF CASES.

#### SECT. I.—OF CLOSING THE RECORD.

AFTER the revised condescendence and answers, and pleas in law, have been lodged, "the parties shall appear before the Lord Ordinary, for the purpose of finally adjusting their respective averments in fact, and their notes of pleas, when it shall be the duty of the Lord Ordinary to hear the respective explanations of the parties, and to examine, as before directed, with the statement of the facts respectively, and of the pleas, as applicable to the summons and cause of action, and to the defence, and to suggest any new plea which may to him appear necessary to exhaust the whole disputable matter in law or fact in the cause. After which, the adjusted condescendence and answers, and relative note of pleas, shall be subscribed by the counsel for the parties; and, before any order shall be pronounced, or judgment delivered, as to the disposal of the cause, the record of the pleadings, as adjusted, shall be authenticated by the Lord Ordinary by his signature; and the record, so made up and authenticated, shall be held as foreclosing the parties from the statement of any new

averments in point of fact, and no amendment of the libel, or new ground of defence, shall be allowed after the record shall have been thus completed, under the exception hereafter to be mentioned;" 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 10.

The regulations of the preceding section are carried into effect in practice, by either party, after the revised condescendence and answers, and notes of pleas, have been lodged, enrolling the cause. If both parties are willing to close the record, avizandum is made with the process for the Lord Ordinary's consideration;<sup>1</sup> and if his Lordship thinks the record should be closed, an interlocutor is pronounced, ordering the cause to the roll, in order that the parties may close the record in the manner already pointed out. If the record require adjustment to make the statements meet each other, a reasonable period will be allowed to parties for this purpose.<sup>2</sup>

"When a party, after reasonable time and opportunity for revision and adjustment of the averments and pleas in law have been afforded by the Lord Ordinary, shall fail to close and authenticate the record, in terms of the statute, or to state any satisfactory ground for farther delay, the Lord Ordinary

<sup>1</sup> "Avizandum with the record previous to closing;" or "the Lord Ordinary makes avizandum to himself with the process, with a view to close the record."

<sup>2</sup> "Appoints the revised papers for the parties to be adjusted in days."

On each paper of the record, such a minute as the following will be written: "subscribed by me as counsel for \_\_\_\_\_, as finally adjusted, A. B." To this will be added, "authenticated by the Lord Ordinary as part of the record," signed by the Lord Ordinary. Then such an interlocutor as this will be pronounced: "In respect of the minutes of parties, closes the record, and appoints parties to be ready to debate." In *Hume v. Hardie, &c.*, 6 Dec. 1842, v. D. 261, and *Parish of Lasswade v. Edinburgh Charity Workhouse, &c.*, 10 Feb. 1844, vi. D. 637, discussions will be found as to what forms are indispensably necessary in closing records.

shall pronounce such judgment as the opposite party may crave, not being inconsistent with the shape and nature of the cause, against which the party shall be reponed only upon a note to the inner-house, within the reclaiming days, and upon payment of such expenses as shall be thought reasonable, and consenting to close the record immediately; A. S. 11 July 1828, § 60.

No judgment can be pronounced on the merits of a cause without closing the record. The 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 4, enacts, "That in ordinary causes, where the defender shall make appearance, and neither party shall abandon the cause, neither the Lord Ordinary officiating in the outer-house, nor the court, shall proceed to give judgment upon the merits in the cause, until the respective averments of the parties in fact, and their pleas in matter of law, shall, as herein after directed, be set forth on the record, and the record made up and authenticated in manner hereinafter appointed." *Falconer, &c. v. Sheills and Co.*, 11 July 1826, iv. S. 829, (N. E. 836); *Doig, &c. v. Fenton, &c.*, 6 Mar. 1827, v. S. 533, (N. E. 501); *Hunter v. Anderson*, 19 Jan. 1831, ix. S. 289. Neither can any record be closed, except in terms of the statute, *Pattison v. Campbell*, 17 Jan. 1827, v. S. 208, (N. E. 193). Where any irregularity has taken place in preparing or closing the record, the court will open it up, and remit the cause to the Ordinary to prepare it *de novo*, *Roy, &c. v. Wright, &c.*, 12 Dec. 1827, vi. S. 235; *Sproat v. Mure, &c.*, 1 Dec. 1826, v. S. 66, (N. E. 61). The same course will be followed where sufficient information is not given for the decision of the cause, *Lord Melville v. Douglas's Trs. &c.*, 12 Dec. 1828, vii. S. 186; *Lothian v. Toda*, 3 Mar. 1829, vii. S. 525; *Fergusson, &c. v. Steavenson, &c.* 26 Jan. 1830, viii. S. 390. See various other cases, S. Dig. Process, No. 464. In some peculiar cases, the Court will allow a record to be opened up after



being closed, on payment of expenses; *Crawford v. Bennet*, 17 May 1832, x. S. 537; *Whitehead v. Elder, &c.* (*Grain-ger's Exers.*), 12 Dec. 1832, xi. S. 201; *Gordon v. Hill*, 25 Feb. 1842, iv. D. 785. Or without such a penalty, where any excusable mistake may have occurred; *Anonymous*, 6 Dec. 1827, vi. S. 213; *Mackenzie, &c. v. Magistrates of Dingwall*, 4 Dec. 1829, viii. S. 184. See also *Robertson and Mandy. v. Rutherford*, 27 Nov. 1841, iv. D. 121. In an advocacy, though there may have been a record closed in the inferior court, there must also be a record closed in the Court of Session, if reasons of advocacy and answers have been lodged; *Baird v. Officer*, 8 July 1829, vii. S. 852; see *infra*, P. iii. 12. 5. But where the decision is not on the merits, a decree may be pronounced, such as a decree in terms of the libel, to the effect of adjudication, and reserving all objections, *contra executionem*, *Bontine, &c. v. Graham, &c.*, 17 Dec. 1829, viii. S. 263; or an interlocutor, ordering an agent to deliver up title-deeds, alleged to be hypothecated, on the amount of his account being consigned, *Hargood v. Johnstone*, 13 Feb. 1828, vi. S. 532; and it is unnecessary to close a record on a question as to the title of a party to sue or defend, *D. of Gordon*, 20 Jan. 1830, Deas and And. v.; *Ross v. Young and Lauder*, 14 Jan. 1831, ix. S. 275; and findings relative to the granting or refusing of a diligence may be pronounced; *Kirkland and Sharpe v. Fraser*, 27 Feb. 1830, viii. S. 610. Neither is it necessary, when a record has been irregularly closed by a sheriff, to prepare and close a record in the Court of Session, previous to remitting to him to proceed, in terms of the act of sederunt; *M'Ewen v. M'Lachlan*, 20 Nov. 1829, viii. S. 85. Expenses may be found due on dismissing a summons, though the record be not closed; *Hamilton v. Durie's Trs.* 19 Dec. 1828, vii. S. 215, and interim decrees granted for sums unquestionably due; *Crawford v. Ballantyne's Trs.* 22 Nov. 1833, xii. S.

113. In the preparation of the record, the Lord Ordinary may competently put the cause into any shape he thinks most conducive to the ends of justice. Although, therefore, papers have been lodged and revised, he may, when they are laid before him, order them to be withdrawn, and new papers lodged; *Mackenzie and Munro v. Magistrates of Dingwall, &c.* 13 Feb. 1827, v. S. 339, (N. E. 314). When parties indulge in unnecessarily voluminous and loose pleadings, it is the duty of the Lord Ordinary to order the papers to be withdrawn; *Hamilton v. Macks*, 27 June 1828, vi. S. 1033. And though a party may lose his case with costs, the expense of unnecessary pleadings made up, on the motion of the gaining party, will be laid on the latter; *Campbell v. Gordon*, 29 May 1844, vi. D. 1097.

Either party may insist on making up a record on condescendence and answers, &c., though he will be subjected in the expenses, if it shall be found unnecessary; *Warrender v. Warrender*, (consistorial), 5 July 1834, xii. S. 885.

When the record is closed, no additions will be allowed to be made to it on any account, in the way of new statements, except in the case of *res noviter veniens ad notitiam*, in the manner to be afterwards noticed; *infra*, P. iii. 13. 2. Nor will such new statements be allowed, with the view of giving any explanation as to the state of the process, the reason for not printing a paper, or otherwise; *M'Intosh v. Cheyne*, 21 Jan. 1830, viii. S. 356; *Kay v. Miln, &c.* 4 Feb. 1830, viii. S. 437. But a special condescendence, or minute of a fact, stated generally on the record, may be allowed; *M'Douall*, 27 Nov. 1829; *Deas and And.*, v. 120; *M'Kenzie*, 11 Dec. 1829, *Ibid.* The ordering of a new condescendence, after the record is closed, even on payment of the previous expenses, is utterly incompetent; *Wilson v. Jamieson*, 3 Mar. 1827, v. S. 518, (N. E. 487). The mode of bringing forward new pleas in law, after the record has been closed, has

already been considered, *supra*, p. 332. A party closing a new record cannot refer to a former one as qualifying or contradicting the other; *Jolly v. Grahame*, 17 June 1835, ii. S. and M.L. 24.

The record being closed, avizandum may be made to the Lord Ordinary with the case, if both parties are anxious for a decision, and think it unnecessary to debate the case. But if not, it will be enrolled in the Lord Ordinary's debate roll; 6 Geo. IV. c. 120, § 13.

A debate is very rarely dispensed with. The record is generally closed, and the case sent to the Lord Ordinary's debate roll, by one interlocutor, *supra*, p. 334, note.

#### SECT. II.—OF DEBATING THE CAUSE.

“The party enrolling a cause in the debate roll of any of the Lords Ordinary for debate, where there is a closed record, shall, at the time of enrolment, deliver to the clerk who enrolls the cause, a written or printed copy of the closed record, and the interlocutors, if any already pronounced thereon, or at least those necessary to explain the state of the cause, without which the cause shall not be enrolled; and wherever the record has been made up on condescendences and answers, the same shall, for the purpose hereby provided, be copied or printed, so that the answer to each article shall be opposite to the corresponding article of the condescendence, or each answer shall be subjoined to the article to which it relates, (*supra*, p. 327); and when the cause has previously depended in any other court, and a proof has been led therein, a copy of the proof shall, at the same time, be delivered to the Lord Ordinary's clerk;” A.S. 11 July 1828, § 61.

In all debates, and in *viva voce* discussions generally, the junior counsel begin the argument, and are followed by the senior, who speak last.

## SECT. III.—OF CASES AND MINUTES OF DEBATE.

In causes of difficulty, Cases, or written pleadings on the merits,<sup>1</sup> (usually called Minutes of Debate, in shorter or less important questions), may be ordered. The Lord Ordinary “may order the parties to argue the whole, or any part, of the cause before him, as often as he may find it necessary, or direct cases in writing to be prepared by the parties, in the form hereinafter appointed, and to be seen, interchanged, and finally adjusted.” “And, after such cases shall have been so lodged, the parties shall have an opportunity of being further heard, if they, or either of them, shall desire it;” 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 16.

The A. S. 11 July 1828, § 62, enacts, “That when the Lord Ordinary, in the due preparation of any cause, shall order cases for advising in the outer-house, he shall appoint the same to be lodged within a certain period, to be fixed by him, on a due consideration of the circumstances, and, at the same time, shall appoint them, after being so lodged, to be seen, interchanged, and re-lodged, within a certain period, also fixed by him; and failing of the cases, or either of them, being so lodged or re-lodged, the Lord Ordinary shall dismiss the action with expenses, or decern with expenses, as the case may be, against which the party shall be reponed

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<sup>1</sup> Since the passing of the Judicature Act in 1825, the number of written pleadings has been much diminished. With reference to this peculiar form in our practice, Mr. Tait says, “It is alleged it was during the period of the Usurpation that the managing of our law debates by writing rather than by pleading, was introduced; for on account of the oath called the Tender, abjuring the family of Stewart, the most eminent lawyers retired from the bar, and consulted only in their chambers; so that the only way to obtain their assistance in the deciding of causes, which both clients, and even the judges themselves, were anxious to have, could only be by writing.”—MS. “Of the Court of Session.” Tait here follows Forbes’ Pref. p. xvi. M. Supp. Vol.

only upon a note to the inner-house, accompanied by the case, and on payment of the previous expenses, without prejudice to the opposite party's moving the Lord Ordinary to pronounce some other interlocutor; in which case, it shall be competent to the Lord Ordinary so to do, if it appear that this will more effectually further the object of preparing the cause for decision."<sup>1</sup>

It does not seem very obvious why the lodging of Cases should be ordered, under so heavy a penalty as payment of the previous expenses; but it is now held, that the Lord Ordinary may exercise his discretion in this case, by allowing a prorogation; the provision of sec. 109 of the act of sederunt being held to apply to it; *Minto v. Kirkpatrick*, 23 Dec. 1831, x. S. 190; and perhaps sec. 72 may also be held applicable to Cases. It is not very clear what is meant by an interlocutor "which will more effectually further the object of preparing the cause for decision," than a judgment dismissing the action, or decerning with expenses; as these last can hardly be viewed as interlocutors *preparing* the cause. "Whereas, the parties giving in cases, are entitled to be further heard, if they desire it; it is declared, that when the parties, or either of them, wish to be further heard, they shall, in a note on their case or cases, mention their desire to this effect to the Lord Ordinary, who shall appoint the cause to be enrolled for debate accordingly;" A. S. 11 July 1828, § 63.

In cases of great importance or difficulty, the Lord Ordinary, instead of deciding the cause himself, submits it for the decision of the inner-house. "When the Lord Ordinary

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<sup>1</sup> "The Lord Ordinary having heard parties' procurators, &c., appoints them to give in mutual Cases, (or Minutes of Debate), arguing the whole cause, (or any particular point), within        days; and when so lodged, allows the same to be seen, interchanged, revised, and relodged within days thereafter."

shall take the whole cause to report, he shall, at the same time, order the parties to prepare and lodge cases, in the form to be hereinafter directed, to be seen and interchanged; and the interlocutor so taking the cause to report, and the order for cases, shall be final;" 6 Geo. IV. c. 120, § 20. The act of sederunt, 11 July 1828, § 64, enacts, "that when the Lord Ordinary, on hearing a cause, considers that it should be disposed of by the inner-house, he shall appoint cases to be put into process before himself, to be seen and interchanged, with the view of reporting the cause to the Court, which shall be lodged under the sanction contained in section 62 hereof; and when both cases, so prepared, are put into process, he shall make avizandum with the cause to the Court, and order the cases to be immediately boxed, and grant warrant to enrol in the inner-house rolls." Such cases must be lodged with the outer-house clerk before avizandum can be made with them to the Court, and they are ordered to be boxed; *Carruthers v. Dickson*, 4 June 1829, vii. S. 699.<sup>1</sup>

The form of the cases is regulated by several enactments; the statute, § 22, enacts, that "wherever cases shall be ordered, whether by the Lord Ordinary or by the inner-house, the case shall commence with a copy of the record, as authenticated by the Lord Ordinary, and each ground of law, or plea, as stated in the record, shall be separately argued in the case."

The act of sederunt, § 107, "declares, that the addition

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<sup>1</sup> "The Lord Ordinary makes great avizandum to the Lords of the Division of the Court. Appoints the mutual cases, as now adjusted, to be printed and boxed within            days, in order to be reported; and grants warrant to enrol in the inner-house rolls, on production to the keeper thereof of a certificate of the boxing of one or both of the printed papers." (When a case is removed from the Outer House to the Inner for consideration, *great avizandum* is the phrase used: *avizandum* simply when a Lord Ordinary takes farther time for consideration before deciding.)

which may be made when the cases are interchanged, shall be inserted under the proper head of the original argument on each separate plea, and not by way of addition at the end of the case; and that the revising of the cases shall be by exchanging the original draughts, so that nothing shall be made part of the process, but a clean copy of the cases on each side." The above regulations as to prefixing a copy of the record to the case, and the arrangement of the argument, are not closely observed in practice. The cases must argue the cause strictly as it appears on the closed record; and, if the argument is founded on facts not set forth in the record, the case will be ordered to be withdrawn, and another, strictly applicable to the record, lodged; *Crauford, &c. v. Bennet*, 26 Jan. 1832, x. S. 537.

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## CHAPTER VI.

### OF DETERMINING AS TO EXPENSES—OF ABANDONING THE CAUSE—OF EXTRAORDINARY ACTIONS— AND OF INTERLOCUTORS.

#### SECT. I.—OF EXPENSES.

THE statute, § 17, farther enacts, "that, in pronouncing judgment on the merits of a cause, the Lord Ordinary shall also determine the matter of expenses, so far as not already settled, either giving or refusing the same, in whole or in part; and every interlocutor of the Lord Ordinary shall be final in the outer-house."

"When expenses are found due to a party, and a remit is made to the auditor to tax the account thereof, the account, together with a copy of the interlocutor finding expenses due prefixed thereto, shall be lodged with the auditor, who shall thereafter fix a time for the taxation thereof; and a copy of the account, together with the auditor's warrant for taxing,

shall be served on the agent for the party, or parties, found liable in expenses, that he may attend at the time so fixed; and the agent for the party found entitled to expenses shall attend at the same time, and produce the process, or such part thereof as may be necessary for the taxation of the account, together with the drafts, or copies of papers, and other vouchers of his account, to the auditor; and after the account is taxed, the agent shall be entitled to get back the process, in order to return the same to the clerk, except in those cases where it may be necessary for the auditor to retain the same for farther examination; in which case, a receipt shall be given by the auditor, or his clerk, for the process"; A. S. 11 July 1828, § 69.

In taxing accounts *between party and party*, the expenses absolutely necessary for conducting the business in a proper manner are only allowed, and although a party be found entitled to expenses generally, he is not allowed those of any particular branch of the litigation, where he has been unsuccessful, or which have been caused by his own fault, A. S. 19 Dec. 1835, vi. Fees sent to counsel must be marked in words on the briefs, memorials, or notes, and attested by his initials, or those of his clerk, and for all other fees, certified notes by the counsel or his clerk, must be produced, *Ibid*; A. S. 6 Feb. 1806, (*Accounts of Expenses, &c.*) Where a party is found entitled to expenses, no higher fees shall be allowed as paid to counsel, than were actually sent at the time; but this rule does not apply to the Poor's Roll, or cases conducted gratuitously by the agent or counsel, on account of the poverty of the party, A. S. 19 Dec. 1835, vi.

#### SECT. II.—OF ABANDONING THE CAUSE.

Where a pursuer finds his action as laid untenable, he may "abandon his cause<sup>1</sup> on paying full expenses or costs to the

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<sup>1</sup> A minute of abandonment of the cause, in such form as the following, is put into process:—"B. (counsel's surname), stated to the Lord Or-



defender, and bring a new action, if otherwise competent"; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 10. But "this applies only to the case of the pursuer abandoning his cause before an interlocutor has been pronounced *assoilzieing* the defender in whole or in part, or leading, by necessary inference, to such absolvitor; after which it shall not be competent for him to do so, in regard to that part of the cause decided by said interlocutor, either expressly or by necessary inference; reserving, however, to him any remedy by a new action, which may be competent to him under subsisting regulations;" A. S. 11 July 1828, § 115; *Wilson v. Exrs. of D. of Queensberry*, 11 July 1826, iv. S. 830, (N. E. 837). The expenses allowed will be only as between party and party, *Lockhart, &c. v. Lockhart*, 15 July 1845, vii. D. 1045. Where a record had been closed, in a petition and complaint under the former election laws, it was considered a question of great difficulty, whether the party could abandon, even on payment of expenses, or whether he was obliged to go on or have the action dismissed, *M'Donald v. Grant*, 20 Feb. 1830, viii. S. 563. In a later case, it was held, that the abandonment of a cause before the record was closed was

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dinary that the pursuer has determined to abandon, and hereby abandons the present action, in terms of the 10th § of the Judicature Act, reserving all right to bring a new action, or to adopt such other proceedings as may be competent."

"The Lord Ordinary having considered the minute by which the pursuer abandons this case, appoints the defender to give in an account of expenses, and when lodged, remits the same to the auditor to tax and report."

"The Lord Ordinary, in respect the expenses due to the defender have been paid, allows the pursuer to abandon this cause, dismisses the action, and decerns with the expense of extract; reserving to the pursuer to bring any new and competent action, if so advised, and to the defender his defences thereto as accords," (this reservation is unnecessary).

not regulated by the judicature act, and that, consequently, the giving or refusing expenses is a matter of discretion with the court, *Caledonian Iron and Foundry Co. v. Clyne*, 14 Dec. 1831, x. S. 133. In some cases, the necessity of abandoning an action may be avoided by amending the libel only, or by a supplementary action; but such amendments or supplementary actions must be resorted to in good time, *Dunn or Mason v. Merry*, 22 May 1832, x. S. 555.<sup>1</sup> As to abandoning before enrolment, see *Laidlaw v. Smith*, supra p. 279, also *Lillie v. Findlater*, 11 Mar. 1836, xiv. S. 687. After a record was closed, but no interlocutor necessarily inferring absolvitor had been pronounced, the pursuer lodged a minute of abandonment of the actions. The Lord Ordinary “assoilzied” the defender with expenses, instead of “dismissing” the action. The pursuer was allowed to bring a new action, notwithstanding the phraseology of the interlocutor.<sup>2</sup> *Shirreff v. Brodie*, &c. 24 May 1836, xiv. S. 825.

#### SECT. III.—OF EXTRAORDINARY ACTIONS.

The procedure we have now explained is applicable to all ordinary actions; but, “in processes of adjudication, count and reckoning, ranking and sale, sale of a pupil’s heritage, division of commonty, division of runrig lands, division among heirs-portioners, choosing of curators, poinding of the ground, and other extraordinary actions, other than those herein before provided for, it shall be in the power of the court, or the Lord Ordinary, to require of parties to proceed according to the forms applicable to ordinary actions, in so far as in each

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<sup>1</sup> See as to amendment of summonses, and supplementary actions, *infra* P. iii. 13. 5-6.

<sup>2</sup> This distinction in the terms of the interlocutor, when the defender prevails, is not always attended to. The defender should not be *assoilzied*, unless the *merits* of the case have been discussed.

particular instance it shall appear fit and expedient to apply these; but, excepting in so far as compliance with these shall be specially required, such actions shall proceed according to the forms in use in such actions before the passing of the statute, except in regard to the power and mode of review of any interlocutors pronounced therein;" A. S. 11 July 1828, § 103; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 27.

#### SECT. IV.—OF INTERLOCUTORS.

Every judgment or interlocutor pronounced by a Lord Ordinary is final in the outer-house, and cannot be submitted to the review of the Lord Ordinary; 6 Geo. IV. c. 120, § 17. It may, however, be brought under the review of the inner-house, provided a reclaiming note be presented within twenty-one days of its date. *Ibid.* § 18. When the reclaiming days expire during vacation or recess, they continue open till the box-day in the vacations or recess; if they do not expire till after the box-day in the recess, they continue open till the first sederunt day after the recess; A. S. 11 July 1828, § 79. As to all interlocutors pronounced during the additional sittings in November and March, (*supra*, p. 123), the reclaiming days run from and after the actual date of such interlocutors, A. S. 8 Aug. 1839, § 5.

"The Lord Ordinary may, with consent of both parties, correct or alter any interlocutor at any time before extract, provided that the consent be given by the counsel of both parties in a minute signed by them;" A. S. 11 July 1828, § 63. The same thing has been done in the inner-house; *Fell, &c. v. Lyon*, 16 Feb. 1830, viii. S. 543; but both parties must consent, *Trs. of Agnew v. Macneel, &c.*, 8 Feb. 1827, v. S. 309, (N. E. 287). It has even been held competent to cancel an interlocutor of the inner-house, *de recenti*, without any consent, where it had been pronounced *per incuriam*; *Cathcart v. Cathcart*, 12 Feb. 1830, viii. S. 497; Aff. on merits, 18 July

1831, v. W. and S. 315; see also *Wright v. Burns*, 6 Dec. 1832, xi. S. 180, and *Gray v. Young*, 22 Nov. 1839, ii. D. 128. A petition to explain an interlocutor of the inner-house has been, however, held incompetent; *M'Christie v. Kea or Fisher*, 2 July 1830, viii. S. 1006; see also *Hunter v. Georges' Trs.*, 1 June 1832, x. S. 604; *Richardson v. Wyld and Co.* 30 June 1832, x. S. 744. An interlocutor of the inner-house, remitting a case with instructions to the Lord Ordinary, may be altered on his Lordship's verbal report, without any application from either party; *Palmer and Co. v. Stewart*, 28 Jan. 1832, x. S. 252.

In *Duguid v. Mitchell, &c.*, 3 June 1824, iii. S. 96, foot note, (N. E. 66), an error in an interlocutor was allowed to be corrected after an appeal was entered; but see foot note i. W. and S. 215; an interlocutor in the bill-chamber extended and signed by mistake, but not entered in the minute-book, or published, was allowed to be deleted; *Fletcher v. Watson*, 15 Jan. 1825, iii. S. 439, (N.E. 307). The technical word "decerns" omitted in an interlocutor, was allowed to be added after a considerable lapse of time; *Laurie v. Donald and Jones*, 16 Jan. 1833, xi. S. 246; (see *infra*, p. 594, note 2). A clerical error in an interlocutor, signed by the presiding Judge, may be corrected on a petition, but not on a simple motion from the bar. *Kerr v. Bremner, &c.* 17 Dec. 1835, xiv. S. 180. See a case where a Lord Ordinary was allowed by the Court to explain what he meant to include under a general finding of "expenses;" *Boswell, &c. v. Inglis*, 9 Mar. 1848; S. Jur. xx. 307. The interlocutors and notes of the Lords Ordinary and interlocutors of the Court are engrossed by the clerks on a separate sheet, which is not lent up, A. S. 24 Dec. 1838; *infra* p. 512.

A Lord Ordinary may, whether the parties consent or not, appoint papers formerly ordered, to be withdrawn, and new papers lodged; *M'Kenzie and Munro v. Magistrates of*

*Dingwall, &c.* 13 Feb. 1827, v. S. 339, (N. E. 314); or he may recall an interlocutor ordering a paper, when it appears that the paper is unnecessary, being a mere repetition of a former one. *Mowat v. Sir J. Stewart*, 20 June 1828, vi. S. 1011. In another case, when a Lord Ordinary had remitted accounts incurred in processes in an inferior court, to the auditor of court, it was found competent for him afterwards to remit the same accounts to the auditor of the inferior court; *Christie v. Douglas*, 20 Feb. 1830, viii. S. 582.

By the act 1693, c. 18, (c. 31, Th. Ed. ix. 283), all interlocutors must be signed at the diet at which the judgment is pronounced, before a quorum of the Judges, otherwise the interlocutor is declared void, and the writer and signer thereof shall incur deprivation. *Infra* P. iii. 6, 4. *in fin.*

## CHAPTER VII.

### OF PROOFS BY COMMISSION, AND OF THE EXAMINATION OF OLD AND INFIRM WITNESSES.

#### SECT. I.—OF THE PROCEDURE IN PROOFS BY COMMISSION.

WE have hitherto only considered the case in which there is no dispute between the parties as to matter of fact. But where the parties are at variance in their statements of facts, it is necessary that a proof should be taken.

Since the institution of trial by jury, proofs by commission are comparatively rare; but as they may still be allowed, "where the parties differ as to facts which do not require to be ascertained by jury trial," 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 14, as where a few witnesses only are to be examined, and the matter to be proved is of a simple nature,—or where, looking to the nature of the matters in dispute between the parties, this mode of proof appears the more suitable, *Buchanan v. Denniston & Co's Trs.*, 17 Dec.

1836, xv. S. 286, it is necessary to consider the forms of procedure.

The most important regulations relative to this matter are to be found in the act of sederunt, 11 Mar. 1800, made perpetual by the act of sederunt, 22 June 1809. By that act, if the proof is to be reported to the whole Court, then, unless otherwise directed by the Court, on cause shewn, the commission must be directed only to one or other of the members of the faculty of advocates resident in Edinburgh, and attending the court, and who are of more than five years' standing at the bar, or to such of the sheriffs or stewards-depute who are resident in Edinburgh during the time of session, or who, when appointed commissioner in any cause, shall undertake to attend upon the court when the state of the proof is ready to be prepared, and while the merits thereof are under discussion ; § 3.

When proofs are allowed by any of the Lords Ordinary to be reported to himself, he may order the commission or other warrant to be issued either to commissioners of the above description, or to any sheriff, or steward-depute, or substitute, or any other inferior magistrate, or the clerk or assistant clerk of any court ; but in no case shall the parties or their agents be allowed to name their own commissioners. This regulation may also be observed in cases to be reported to the Court, providing special cause be shewn—as the smallness of the sum at stake—the necessity of immediate despatch, or that the commission is granted merely for the examination of a party, or the exhibition of writings, or to expedite matters in a judicial sale, or that the proof is to be taken in a very distant part of the country, where none of the regular commissioners can attend, § 5.<sup>1</sup>

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<sup>1</sup> The interlocutor allowing a proof by commission is in such terms as these :—“ Allows the pursuer a proof of the facts averred by him in the

In case it shall be necessary to examine witnesses forth of Scotland, the commission shall be directed to some person duly qualified, and with and under such regulations and instructions as the Court or Ordinary shall give, § 6.<sup>1</sup>

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article of his revised condescendence, (and the defender a conjunct probation regarding the same); grants diligence at the instance of both or either of the parties for citing witnesses, (and havers), and grants commission to                   to take their depositions, (and receive their exhibits)."

<sup>1</sup> The general style of such Commissions will be gathered from the following interlocutors:—In *Duguids, &c. v. Duguid*, 20 May 1826, iv. S. 613, (N. E. 620), where the object was to take proof of the legitimacy of the children of a party who had gone to America in 1768, the court granted commission "to any judge of the supreme court of the United States of North America, or province of Canada, or to any justice of peace, being a judge of a Court of Common Pleas in the said United States of North America, or province of Canada, or to the mayors of the towns or cities of those states or province, to take said proof at any place said judge or mayor shall appoint, a month's notice being given thereof in sufficient time to the known agent in America, for the trustees and residuary legatees of the late William Duguid; and allow the said trustees and legatees a conjunct probation thereanent."

In *Barclay v. Barclay*, a case of competition of briefs, and subsequent reduction of a service obtained by one of the parties, involving questions of marriage and legitimacy, Lord Ivory granted the following commissions:—(*In the Service*), 17 July 1840.—"The Lord Ordinary having heard counsel for the parties, grants warrant for Commission and Diligence at the instance of both parties, for the examination of havers, recovery of documents, and making excerpts from public records as to all matters tending to establish their respective claims, and also for the examination of all witnesses resident in England or Ireland, or beyond the jurisdiction of this court, and all other witnesses within Scotland, whose evidence, owing to great age, indisposition, or their being about to leave the country, is in danger of being lost,—the witnesses' names being always specified in a list, to be served upon the agent for the respective parties, at least fourteen days before such examination takes place, if within Great Britain, and if furth thereof, on such due and reasonable notice as the circumstances require; and the age, indisposition, or fact of the witnesses within Scotland being about to

Proofs to be reported to the whole court, unless otherwise directed, shall only be taken during the spring or

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leave the country, being always duly certified to the commissioner examining before examination, with this declaration, that it shall be competent to the party examining witnesses, to produce any of them at the service, in which case the deposition of the witness or witnesses so produced shall not be used : Allows a conjunct probation of witnesses to both parties ; grants commission to either of D. R., Esq., solicitor, J. R., Esq., solicitor, J. A., Esq., barrister at law, A. G., Esq., solicitor, London, A. C., Esq., advocate, the clerk of the Supreme Court in the Mauritius, or the British Consul nearest resident to the place where the examination shall take place, of witnesses or havers not within Great Britain and Ireland, or its dependencies, to take the oaths, examinations, and depositions of the said witnesses and havers, and to receive their productions and exhibits any lawful day or days between and the fifth sederunt day in November next, to be then reported, due notice being always given to the parties or their agents respectively, of the time and place of proceeding with the said examination : Grants diligence against the said witnesses and havers for citing them to appear before the said commissioners : Appoints the depositions of the witnesses to be sealed up by the commissioner before whom they shall be taken, and transmitted to the office of John Hay, depute-clerk of Session, clerk to the process, and there to lie *in retentis* under seal, subject to the future orders of the Lord Ordinary or the court ; and dispenses with the minute book."

(*In the Reduction.*)—15 June 1844.—"The Lord Ordinary having heard counsel for the parties, allows a proof to both parties of their respective averments, to be taken by commission in ordinary form : Grants diligence accordingly at the instance of both or either of the parties against witnesses and havers : Grants commission respectively to J. T. G., Esq., advocate in Edinburgh, or to the judge ordinary of the bounds where the witnesses and havers reside, if within Scotland ; to the said J. T. G., or to J. A., Esq., advocate and barrister-at-law ; whom failing, to J. R., Esq., solicitor, London ; whom failing, to D. R., Esq., solicitor, London, where they are resident in London or its neighbourhood ; to the said J. T. G., or to any of the Masters Extraordinary of the High Court of Chancery, nearest their residence, where they are elsewhere resident in England ; to the said J. T. G., or to any of the Masters Extraordinary of the High Court of Chancery in Ireland, or any other officer of any of the supreme courts of



autumn vacation, in order that the commissioners may attend, without inconvenience to themselves. The periods of attendance, as well as the place or places where the witnesses are to be examined, shall be adjusted at their sight by the Lord Ordinary or Court, and the commissioners choose their own clerks.

The commissioners are recommended to exercise their own judgment in the manner of conducting the proof, and particularly, to allow no matter to be introduced which is not pertinent to the cause, nor any unnecessary pleading or altercation about the competency of questions, or the admissibility of witnesses, and to check the parties if they attempt to load the proceedings with unnecessary evidence or superfluous matter of any kind. They are also to attend to the rules of evidence, and to give their own deliverances either *viva voce*, or in writing, as they see cause, upon any debate which may occur. Their whole proceedings are subject to the after consideration of the court, upon application made by either party; in order to which, the commissioner himself, or those acting for the parties, may take such notes on a separate paper as they think proper, for the due in-

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that kingdom, appointed for taking affidavits where they reside in Ireland; and to the said J. T. G., or to the solicitor or notary of the British Embassies respectively at the Courts of the Netherlands, Belgium, and Prussia, or other foreign country, where they are resident abroad, to take the deposition of the said witnesses and havers, and report; and failing there being a solicitor or notary of any of said embassies, or its being inconvenient for such solicitors or notaries to take the proof, then to any other properly qualified person who may be named by the party at the head of said embassies respectively for the time; the examination of witnesses and havers in Scotland and England to proceed on not less than fifteen days' notice, and those resident elsewhere, at such time as may be arranged between the parties—said commission to be reported to the Lord Ordinary by the tenth sederunt day in November next."

formation of the court ;<sup>1</sup> but nothing shall enter the report but what the commissioner himself may think material ; § 4.

In the interlocutor in *Lockyer v. Sinclair*, 3 Mar. 1846, viii. D. 582, a statement by the court will be found as to the duties of sheriffs examiners, in taking proofs in consistorial causes, which is applicable generally to the conduct of proofs on commission in other cases. The court declared that it is the commissioner's duty, in such cases, to preserve the character of the records of the court, by excluding impertinent and offensive matter wholly irrelevant,—to protect the witnesses from intimidation and insult,—to prevent judicial examinations being made the source of oppression, and to check all attempts to protract examinations in point of time, to an extent which forms a great abuse, and a most severe burden in point of expense.

If it appear to the commissioner that any witness is not disposed to tell the truth, or behaves in an unusual manner, he is recommended to take a note thereof at the time, by way of assistance to his memory, in case he should be appealed to on that subject, by either of the parties when the proof comes to be advised ; or if he thinks proper, he may annex the same to his report of the proof ; § 7.

The commissioner and his clerk are to be paid for their expenses and trouble, and no proof shall be advised until every such expense be settled and paid, under the direction of the Lord Ordinary or Court ; *Ibid.* § 9.<sup>2</sup>

At the same time that a Commission or remit is obtained,

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<sup>1</sup> In the case of *Couper, &c. v. Marquis of Bute*, tried in the *Jury Court*, 16 June 1828, iv. Mur. 551, it was ruled, that facts relative to the conduct of a witness while under examination on commission, could not be proved by a written communication from the commissioner. It is presumed that proper parole evidence would have been admitted.

<sup>2</sup> Agents are no longer personally responsible to accountants, engineers, &c., to whom remits may be made in processes. *Infra*, P. iii. 10. 2. They are still liable to commissioners ; *A. B. v. C. D.*, 18 Nov. 1843, vi. D. 95.

application must also be made for a Diligence. It is usual even when a conjunct proof is to be taken, to take out one commission, of the expense of which each party pays one-half. Each party takes out a diligence for himself. This is a writ signed by the Extractor, and passing under the signet, and is a warrant for messengers-at-arms to cite the witnesses or havers to appear before the commissioner. If the witness refuse to appear, or to depone when he does appear, letters of second diligence will be issued, upon an application to the Lord Ordinary or Court, by whom the first diligence was granted. This is a writ of the nature of a caption, signed and signeted as the first diligence; and it authorizes messengers-at-arms to apprehend the witness, and bring him before the commissioner for examination. Sometimes letters of first and second diligence are granted at the same time; but the second diligence ought not to be executed until the witness has failed to appear, or to depone when cited on the first diligence, of which a certificate under the hand of the commissioner should be procured in supplement of the execution of the diligence under the hand of the messenger; Bev. 607.

The commissioner, parties, their agents and witnesses, being met, the commissioner appoints a clerk, and administers to him the oath *de fidei*. Where there is merely a remit to examine the witnesses, the process must be laid before the commissioner, as he has no other means of seeing the authority under which he acts, or the matter sent to proof. Where there is a commission, again, the process need not be produced, for the terms of the interlocutor allowing the proof is inserted in the commission. A witness must not be allowed to be present, when the examinations of the others are going on. The commissioner having dictated to the clerk the preamble<sup>1</sup> of the report, setting forth the place and

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<sup>1</sup> The preamble is generally in such terms as these:—At the  
day of . . . There was presented to A. B., (the Com-

time of taking the proof, the parties present, the names of the pursuer and defender of the process, his acceptance of the commission, and his appointment of a clerk, and the administering to him of the oath *de fidei*, the first witness is called in. If no objection is made to the witness, the usual oath is administered by the commissioner. Before being examined *in causa*, it was formerly required that he should be purged of partial counsel and examined *in initialibus*; that is, that he should swear that nobody had instructed him how to depone, that nobody had given or promised to give him any thing for his testimony, and that he had no ill will to either of the parties in the cause. This preliminary procedure, though still competent, is no longer necessary, and now rarely occurs, 3 and 4 Vict. c. 59, (7 Aug. 1840), § 2. The evidence of the witness should be taken down as nearly as possible in his own words, and the commissioner, in conducting the proof, will pay attention to the instructions in the A. S. 11 Mar. 1800, already mentioned. The examination of the witness being finished, the deposition is read over to him, and is closed with the solemn affirmation, "*All which is truth, as the deponent shall answer to God.*"<sup>1</sup> It is then

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*missioner—add his designation*), Commission, dated the                      day of  
    granted by the Lords of Council and Session, (or Lord  
 Ordinary), in an action depending in the Court of Session at the instance  
 of C. D., (*design him*) against E. F. (*design him*) to take the proof in  
 that cause; of which commission the said A. B. accepted, and appointed  
 G. H. his clerk, to whom he administered the oath *de fidei*; appeared  
 J. K. and L. M., counsel and agent for the pursuer, and N. O. and P. Q.,  
 counsel and agent for the defender;—

Whereupon COMPEARED R. S., (*design him*), aged                      and upwards,  
 a witness for the pursuer, who being solemnly sworn and interrogated,  
 DEPOSES, &c. &c. (The depositions are often made to run in the first  
 person. "I depone, &c.")

<sup>1</sup> In writing the depositions, sums and numbers ought to be expressed  
 in words, not figures. The witness, commissioner, and clerk, sign at the

signed by the witness, commissioner, and clerk. If the witness cannot write, that circumstance is mentioned in the deposition. If the witnesses cannot all be examined in one day, the examination is adjourned by a short note on the report; and a short preamble, mentioning the date and parties present, commences next day's proceedings.<sup>1</sup> The allowances to witnesses, and the mode of recovering the amount, are explained, *infra* P. iii. 8. 5.

The Commissioner must be present during the whole examination. If not, the proof is null, and the objection, as relating to a matter occurring in the course of the process, may be stated without a reduction; *Jaffray v. Murray*, 6 Mar. 1830, viii. S. 667. See *M'Laurin v. Stewart*, 14 Feb. 1832, x. S. 333. The depositions usually conclude with the words, "*And all this is truth,*" &c., but their omission does not annul the deposition; *Galloway v. Gilmer*, 29 Jan. 1830, *Deas and And.*, ii. 218; see *A. B. infra*, next page.

But in *Robb v. Campbell*, 19 Nov. 1824, iii. S. 301, (N. E. 212), a proof taken in the inferior court was held inadmis-

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end of the deposition of each witness, and also, every page of the report, adding to their signatures the words *Commissioner* and *Clerk* respectively. There ought to be no interlineations. Any addition necessary may be put in the margin, and subscribed by the witness, commissioner, and clerk, writing their christian names on one side of such addition, and their surnames on the other. Any words deleted in a deposition, will be counted before signing, and their number stated. At the end of the whole, a docquet in such terms as these, is added, "what is contained in this and the preceding pages, is the report of the commission mentioned on page first hereof: humbly reported by A. B. *Comr.*, G. H. *Clerk*."

<sup>1</sup> It is convenient to express the minute of adjournment in general terms. "The commissioner adjourns the diet till the       day of       A. B. *Com.*, G. H. *Clerk*." On reassembling, the proceedings begin with a short minute. "At the day of       at an adjourned diet of the commission foresaid. Present (*parties*) in presence of said Commissioner, COMPEARED, &c. &c.

sible, not being authenticated by the signature of the judge examiner. The same objection having occurred in two subsequent cases, the court remitted to take the proof *de novo*, *Strachan v. Tomlins*, 19 Feb. 1825, iii. S. 560. (N. E. 386), *Baxter v. Kilgour*, 26 Feb. 1825, iii. S. 595, (N. E. 408). A proof in an inferior court was led by a pursuer, and the diets were attended by both parties, but several of the depositions were unauthenticated by the commissioner's signature. It was held, in an advocacy by the defender, that the advocator was not barred from objecting to the regularity of the proof; that the judgment proceeding on such proof must be recalled, and a remit made to the inferior court, with instructions to recall the interlocutors complained of, to grant commission, and allow a proof of new, if so required. It was observed in this case, that under the remit the error might be cured by the commissioner calling the witness before him, in presence of both parties, causing their depositions to be read over to them, and on their adhering thereto, on oath,—authenticating the depositions with his signature, *M'Phun v. Reid and Co.*, 23 Jan. 1836, xiv. S. 339. In a proof of the value of lands in a ranking and sale, the commissioner's report did not set forth, at the commencement of theseveral depositions, that the witnesses were sworn, nor did it bear at their close "all which is truth, as the deponent shall answer to God;" the attention of the court having been called to this irregularity before any further procedure was had in the process; it was held unanimously that the irregularity should be cured by taking and reporting this proof in a correct form, and this notwithstanding an offer by the common agent to instruct that the witnesses examined had been duly sworn, and that the clerk to the proof had merely omitted to state this, *A. B.* 20 Feb. 1838, xvi. S. 630. In *Robertson v. Mason*, 3 Dec. 1841, iv. D. 159, it was held not to be a valid objection to a proof reported by a sheriff commissary, that,

it did not bear the oath *de fidei* to have been administered to the clerk, and the objection was also repelled that the clerk had not signed the proof along with the sheriff commissary.

The proof is taken in the mode above mentioned, when no objection is made to the admissibility of the witnesses, or to the questions put to them. If a witness is to be objected to, the objection, if meant to be proved in any other way than by the witness's own deposition *in initialibus*, must be made before the oath is administered. The witness having withdrawn, the commissioner hears the parties on the relevancy of the objection. If the objection be considered well founded, and the proof of it is clear, the witness will be rejected. But otherwise he will be received, and his examination will proceed. In either case, the party who thinks himself aggrieved may apply to the Court or Ordinary; and if he means to avail himself of this right, he ought immediately to protest that he intends to bring the commissioner's decision under review, and take instruments in the hands of the clerk. If the commissioner considers the objection of too much importance for him to decide, he will make *avizandum* with it to the Lord Ordinary or Court, and wait a remit with instructions. Where the objection is considered less important, or despatch is necessary, the commissioner will allow the witnesses to be examined *cum nota*, and the same course will be followed where the objection goes rather to affect the credibility than the admissibility of the witness. In such cases, it is the practice to seal up the deposition, not to be opened or used in evidence until the objection is judged of by the Lord Ordinary or the Court. Where the objection to the witness arises from his examination *in initialibus*, or the objection is not to the witness, but to the question proposed to be asked, the same procedure is followed. In all these cases the com-

missioner will attend to the recommendation of the act of sederunt 1800.

If the interlocutor allowing the proof has been pronounced by a Lord Ordinary, and it is intended to reclaim against it, the process ought immediately to be borrowed up. For, although the commission and diligence ought not in strictness to be extracted till the act has been read nine days in the minute book, it is usual to extract them immediately.

The time for reporting a diligence is now always fixed in the interlocutor granting it, and the time will not be prorogated, nor the diligence renewed, except upon payment of such previous expenses as the court or Lord Ordinary may modify, unless before the elapse of the time so fixed, special application be made for such prorogation, and it will only be granted on cause shewn; A. S., 11 July 1828, § 108; see *infra*, p. 370. But it is enough if the cause has been enrolled during the currency of the order, although the time has expired before the motion is made; *Masson v. Masson*, 19 June 1829, vii. S. 771. In particular cases, and where the party leading the proof is not to blame, a second prorogation will in some cases be granted, even after the elapse of the term allowed; *Weild, &c. v. Weild*, 14 Dec. 1827, vi. S. 247. In applying for such renewal or prorogation, it must be considered whether the proof to be taken was appointed to be reported to the Court or to the Lord Ordinary. For unless it was ordered to be reported to the Lord Ordinary, an application for a renewal or prorogation must be made by application to the Inner house, to which the proof was to be reported.

When the proof has been completed, the report of it will be lodged with the clerk to the process, and the cause will be enrolled to report it. If the proof has been ordered to be reported to the Ordinary, an interlocutor of Circumduction, *i. e.* a formal declaration by the judge, that the time



for leading the proof has closed,<sup>1</sup> will be pronounced ; and generally, either an order to debate on the import of the proof, or if there has been a debate formerly, and the proof is clear, avizandum will be made to the Ordinary. If it is to be reported to the Court, circumduction will be granted, and great avizandum made to the inner-house. In *Renny v. Cuthill*, 20 Feb. 1800, Hume, 494, the Court held that, in point of form, where a proof has been allowed, circumduction must be pronounced before decree on the merits can be given. When the term for reporting the proof has expired without the party who undertook the proof doing any thing in it, the Lord Ordinary or Court will pronounce an interlocutor of circumduction, and such other order as may be necessary in the circumstances of the case, or a decree of absolvitor, or in terms of the libel, may be obtained, on account of the party renouncing his attempt to prove what he has undertaken. Circumduction may be recalled in special circumstances, but this may be conditional on payment of a greater or less sum of expenses ; *Lindsay v. Thomson*, 26 Jan. 1839, i. D. 434 ; see also *Finlayson or Muir v. MacKenzie*, 6 June 1829, vii. S. 717. Where the term for proving under a commission and diligence repeatedly prorogated, was finally circumduced, and the documents recovered (which were very numerous), were not tendered to the clerk of the process till some days after the interlocutor of circumduction, and the clerk refused to receive them, the Lord Ordinary, on a remit from the court, allowed them to be received, without payment of any expenses ; *Oswald, George, and Co. v. Stronach and Grainger*, 1847, Outer-house, Lord Robertson, (not reported.) Even where the parties had declared their proof concluded, the court affirmed a judgment of the commissaries, which had allowed additional

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<sup>1</sup> The interlocutor of circumduction is in these terms :—" The Lord Ordinary circumduces the term for proving."

proof, in such circumstances, in a question of status; *Elder v. M'Lean* or *Elder*, 17 Nov. 1829, viii. S. 56.

SECT. II.—CASES IN WHICH PROOF BY COMMISSION NOT  
ALLOWED.

In certain cases proof cannot be taken by commission. Thus, by the 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 28, the following cases are appropriated for trial by jury:—  
“All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables or to land, when in this last case the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency, or *quasi* delinquency of any kind, where the conclusions shall be for damages only, and expenses; all actions on the responsibility of shipmasters and owners, carriers by land or water, inn-keepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels, and other articles; and in general, all actions grounded on the principle of the edict *nautæ cauponæ stabularii*; all actions brought for nuisance; all actions of reduction on the head of furiosity and idiotcy, or on facility and lesion, or on force and fear; all actions on policies of insurance, whether for maritime, or fire, or life insurance; all actions on charter parties and bills of lading; all actions for freight; all actions on contracts for the carriage of goods by land or water; and actions for the wages of masters and mariners of ships or vessels.”

In *Kerr v. Hunter Blair, &c.*, 10 Mar. 1837, xv. S. 784, it was held that in the causes enumerated, as appropriated to jury trial by 59 Geo. III. c. 35, and the other statutes regulating such mode of trial, where the action concludes for damages only, the court have no power to take proof by commission, or in *presentia*, but must remit all such cases

for trial by jury. An appeal taken in this case was dismissed as incompetent, 19 June 1837, iii. S. and M'L. 1.

In reviewing the judgment of an inferior court, in a case in which a proof has been led, it has been held incompetent to allow a proof by commission in the Court of Session. The case must be remitted to the inferior court, or a trial by jury ordered; *Carrick v. Mather, &c.*, 17 Jan. 1827, v. S. 211, (N. E. 195). In advocations, under section 40 of the statute, relative to the mode of proof, in cases above the value of £40, it is not imperative to remit the case to a jury; *infra*, P. iii. 12. 3. After a remit to the Jury Court, and a retransmission on a point of law, it was held still competent to allow a proof by commission; *Hutchison, &c. v. Tod, &c.*, 17 May 1823, ii. S. 318, (N. E. 281). Where a party asks the judgment of the Lord Ordinary on a case as it stands, he cannot afterwards be allowed a proof; *Shortt v. Lascelles*, 16 May 1828, vi. S. 810. See also *Elrick's Trus. v. Duff*, 1 Dec. 1824, iii. S. 343, (N. E. 242).

As to proof in consistorial cases, see *infra*, P. iii. 11. B. 1, and in reductions of services, P. iv. 8. 10, *in fin.*

#### SECT. III.—OF THE EXAMINATION OF AGED AND INFIRM WITNESSES.

It sometimes happens that, after a cause has commenced, there is considerable danger of losing the evidence of witnesses, either on account of old age or disease, or from their being about to leave the country. During session, it was always competent to have such witnesses examined, by applying to the Lord Ordinary or Inner house; and the Court have also in some cases authorized the examination, even before the case has come into court; *Smith, &c. Petrs.*, 21 Jan. 1802, M. Pro. App. No. 5; *Blair v. Magistrates of Brechin*, 16 June 1825, iv. S. 98, (N. E. 100); *Johnstone v. Keyden*, 9 July 1824, iii. S. 238, (N. E. 167). Authority for such exami-

nation, however, could not formerly be obtained during vacation or recess; but this was remedied by act of sederunt, 11 July 1828, § 117, which, at the same time, shews what witnesses can be examined in this manner. It is enacted, "That in order to prevent the loss of evidence by the death of witnesses, it shall be competent to the Lord Ordinary on the bills, in time of vacation or recess, on an application duly intimated forty-eight hours before to the known agent of the opposite party, and on production of a process depending before a Lord Ordinary in the Outer house, or in the Inner-house of either division, or of a summons before the Court of Session duly executed, or of letters of suspension or advocacy duly executed, or of the copy of such summons or letters served on the defender or respondent, or of an extract of such letters under the hand of the extractor of the signet, the proper and legal evidence of execution being produced, and after hearing objections, if any shall be made, to grant commission and diligence for taking the examination of witnesses, whose evidence, owing to great age, (not under seventy years,) or to severe indisposition, or to their intending to go abroad, and remain abroad for a considerable time, is in danger of being lost; such examinations to be sealed up by the commissioner, and to lie *in retentis*, subject to the future orders of Court; provided always that such examinations shall be limited to matters of fact, to be set forth in a correct confession for the party making the application, with or without answers thereto; and provided, also, that the party making the application shall state, and, if required, shew, to the satisfaction of the Lord Ordinary, that he was unavoidably prevented from making it to the Lord Ordinary in the cause, or to the Court during session." The petition should set forth the name of the witnesses to be examined, and the reason for examining them, otherwise it may be dismissed, *Ferrier v. Berry, &c.*, 11 July 1822, i. S. 560, (N. E. 512). Power will be delegated to the commissioner to determine what

parties, in point of age, &c., it is proper to examine, and due notice of the witnesses' names must be given to the opposite party, before the examination. *Oswald, &c. v. Laurie, &c.*, 9 Dec. 1824, iii. S. 381, (N. E. 269). In a reduction of a service, witnesses may be examined who have previously given evidence before the inquest, *Ramsay v. Cochrane*, 10 Mar. 1825, iii. S. 643, (N. E. 450).

The commission is in general granted to the sheriff-depute or substitute of the county where the witnesses are, and the proof, that the witnesses are above seventy, &c., is made to the commissioner, *Oswald, &c.*, supra; *Harvey's Trs. v. Leslie*, 5 July 1827, v. S. 896, (N. E. 832); *Mags. of Glasgow v. Dawson and Mitchell*, 10 July 1827, v. S. 915, (N. E. 849); *Morrison, &c. v. Cowan, &c.*, 5 July 1828, vi. S. 1082. In cases where there is a *penuria testium*, witnesses, though neither aged, nor in bad health, are sometimes allowed to be examined, *Copland v. Bethune*, 2 Feb. 1827, v. S. 272, (N. E. 253); but it is doubtful if a Lord Ordinary, even of consent of parties, can allow such a proof, *Malcolm v. Stewart, &c.*, 6 June 1829, vii. S. 715. Where there is no *penuria testium*, or the application appears unnecessary, it will be refused, *Dudgeon v. Forbes*, 11 July 1832, x. S. 810. In *Bond and Mandy. v. M'Leod*, 19 Nov. 1841, iv. D. 35, it was observed, that, in general, a commission should be at once granted to examine witnesses abroad, allowing the objections to the witnesses to be stated afterwards. See as to the competency of a Lord Ordinary to grant commission, *in initio litis*, for the examination of witnesses residing abroad, but not alleged to be in danger of life, to lie *in retentis*, even where both parties consent, *Malcolm v. Stewart, &c.*, supra. The oath in supplement of a pursuer, (a merchant), supposed to be dying, may be taken to lie *in retentis*, until the question is decided whether he is entitled to give such oath, *Crawford v. Wingate and Co.*, 9 Mar. 1842, iv. D. 903.

Notwithstanding the above regulation, relative to giving in a condescendence of the facts to be proved, the appending of such condescendence is held irregular, where the application is made to the Court, *Watsons, Petrs.*, 17 Dec. 1829, viii. S. 261; *Cameron, &c., Petrs.*, 3 Feb. 1830, *Ibid.* 435. When such applications to the court are to be opposed, this must be done *viva voce*, for the court are not in the practice of allowing answers, *Ibid.*

It is very usual to make such applications to the Court, even where the process is in dependence before the Lord Ordinary, *Smeall, &c. v. Wilson, &c.*, 22 Dec. 1821, i. S. 234, (N. E. 222); and the objection that the application ought to be made to the Ordinary, has been repelled, *Morrison, &c.*, *supra*; but the Ordinary has power to grant a commission for such an examination, and the correct form is to apply to him, except where the process has not come into court, and then the Inner-house must, of course, be applied to during session, *Bryden v. Scott*, 14 June 1825, iv. S. 87, (N. E. 90).

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## CHAPTER VIII.

### OF THE PRODUCTION OF WRITINGS, AND THEIR RECOVERY BY DILIGENCE.

#### SECT. I.—REGULATIONS FOR PRODUCTION OF PAPERS.

GREAT anxiety is evinced in the Judicature Act and relative Acts of Sederunt, to secure an early production of all writings pertinent to the issue of the cause; but affidavits in support of a party's averments (except when expressly enjoined by the forms of Court, chiefly at certain stages in jury practice) will not be received; *Johnston v. Scot and Small*, 14 Jan. 1829, vii. S. 234. See the old A. S. 15 July 1692.

The Judicature Act, § 3, enacts, "That, along with the summons, and with the defence, the parties shall respectively

produce the deeds or writings on which they respectively found, so far as the same are in their custody, or within their power;" and, where condescendences and answers are lodged, the parties are again enjoined to produce with them "all writings in their custody, or within their power, not already produced, on which they mean to found"; § 8.

The act of sederunt, 11 July 1828, § 54, enacts, "That where the summons and defences are held by the parties as the record, a farther production of writings may be made on either side, provided this be done before the record is closed, in terms of the statute; and, in the same event, it shall also be competent for both, or either of the parties, to apply for a diligence for recovery of such writings as they can condescend upon to be necessary, in support of the action or defence."

Farther, § 55 enacts, "That all writings in the custody of the parties, or within their power, which are founded on, and have not been previously produced, shall be produced, according to inventory, with the condescendence and answers, or mutual condescendences, without prejudice to the production of writings along with the revised condescendence and answers which may have been rendered necessary by the new averments or productions, of the opposite party; and after the record is made up and closed, it shall no longer be competent for the party, in any case, to produce any writing which was in his possession, or within his power, at the time of completing the record, unless he shall instruct it is *noviter veniens ad notitiam*; but it shall be competent to the parties to apply for a diligence for recovery of writings *in modum probationis*, or to produce such writings, previously in their power, as may be rendered necessary by the production of papers made by the other party after the record is closed;" but otherwise a party will not be allowed at this stage to produce papers formerly within his power, *Brodie v. Brodie*,

&c., 6 July 1827, v. S. 900, (N. E. 835). In a special case, production of a new document was allowed to be made with a revised case after the record was closed, *Lord Macdonald v. Grant*, 15 Jan. 1831, ix. S. 280. See *infra*.

There are three situations in which the writings may be,—

1. In the possession of the party wishing to produce them;
2. In that of his adversary;
3. In the possession of a third party.

1. Almost the only question which occurs where the writings are in the possession of the party wishing to produce them, is as to the meaning of the terms "within his power," used in the act. Now, documents in the possession of a party's agents, or servants, must be held to be within his power; but where they cannot be recovered without legal compulsion, they are not to be considered within one's power, for it is not required that, before bringing an action founded on such documents, proceedings must be instituted for their recovery. The action may be raised, and a diligence will be granted to recover them, after it comes into court; *Peter v. Mitchell and Weir*, 23 Dec. 1826, v. S. 193, (N. E. 179); though, after the record is closed, the party will not be allowed to produce any writing within his power at the time of closing, *Brodie v. Brodie, &c.*, 6 July 1827, v. S. 900, (N. E. 835), *supra*, and a reasonable time must, therefore, be allowed for production before closing the record, *Scott and Co. &c. v. Boog*, 18 Jan. 1828, vi. S. 383, the party being subjected in expenses if there is undue delay; same case, 16 May 1829, vii. S. 619. Yet the court, or Lord Ordinary, may, after the record is closed, order production, *in modum probationis*, of any paper, within the power of the parties, which the court or ordinary may think necessary for the proper decision of the cause, *Hamilton v. Cuthill*, 15 Nov. 1828, vii. S. 21; and same parties, *A. B. v. C. D.*, 21 Feb. 1828, vi. S. 571; *Turnbull v. Forsyth*, 21 Jan. 1832, x. S. 228; *Cub-*



*bison v. Hyslop*, 29 Nov. 1837, xvi. S. 112; and, in particular cases, production of such papers after the record is closed may be allowed; *Smitton v. Taylor, &c.*, 4 Feb. 1832, x. S. 298; *Wilkie v. Jackson*, 4 Mar. 1834, xii. S. 520. But see *Ross v. M'LAY's Trs.*, 22 May 1834, xii. S. 631; *Wrights v. Bell, &c.*, 10 Dec. 1836, xv. S. 242. If a party, instead of producing his writings with his condescendence and answers, delays to lodge them till after the case has been sent to avizandum, previous to closing the record, he will be found liable in the expenses occasioned by the delay, even although the writings may not have previously been in his possession, *Clyne v. Coghill*, 9 July 1828, vi. S. 1109; *Fraser v. Hill and Paul*, 28 Nov. 1833, xii. S. 138. See *Milnes v. Farquharson*, 4 Dec. 1827, vi. S. 203.

SECT. II.—WHEN WRITINGS IN POSSESSION OF ADVERSE PARTY.

When the writings wanted are in the custody of the adverse party, they may either be recovered by diligence, in the same manner as when they are in possession of third parties, to be immediately explained, or may be ordered to be produced by the Lord Ordinary. Some limitations are, however, to be observed in the right to recover papers from a party to a cause. Thus, after a precognition has been taken by the procurator fiscal, and a party committed in order to trial, on a charge of the felonious abstraction of writs, the accused cannot be examined under a diligence against havers in a relative civil process for recovery of the same writs, *Livingston v. Murrays*, 10 Dec. 1830, ix. S. 161; still less can a party charged with a criminal offence be forced to produce a letter which he has written in relation to the criminal charge, but which has not been sent; Same parties, 17 June 1831, ix. S. 757. So also defences prepared by the party accused in a criminal prosecution,

but never lodged in process, cannot be called for in a subsequent civil action relative to the same subject matter; *Gavin v. Montgomerie and Lindsay Crawford*, 17 Dec. 1830, ix. S. 213. A party cannot be compelled to produce a memorial laid before counsel for opinion, *Thomson's Trs. v. Clark*, 4 Mar. 1823, ii. S. 262, (N. E. 233); *Clark v. Spence*, 16 July 1824, iii. Mur. 455. Where the party did not produce the papers without diligence, or assigning a term, he was formerly fined, A. S. 20 Nov. 1711, § 17; but the more effectual remedy is now resorted to of deciding the case against him, if, after sufficient time being allowed, he delays to comply with the Lord Ordinary's order; and he will be reponed upon reclaiming to the Court, only upon production of the writs, within a limited time, and upon payment of the expenses incurred by his contumacy; *Napier v. Douglas*, 16 Dec. 1825, iv. S. 325, (N. E. 329), *Dimsdale, &c. v. Ware, &c.*, 17 Dec. 1829, viii. S. 262. See *infra*, sects. vii. and viii.

#### SECT. III.—WRITINGS IN POSSESSION OF THIRD PARTIES.

The most usual method of recovering writings, even those in the possession of the adverse party, is by letters of incident diligence. The right of litigants to call on third parties to exhibit documentary evidence in their possession, evidently rests on the same principle as the right to compel their attendance as witnesses. Where it is wished to recover documents in this manner, application is made to the Lord Ordinary, or Court, (if the process be in the Inner house), for a diligence to summon the party. This form was substituted, in place of the former tedious procedure, by the act 1672, c. 16, (c. 40. *Regulation of Judicatories*, Th. Ed. viii. 84), § 25. The Diligence is frequently granted at the first calling of the cause in the weekly roll, when an order is made to lodge condescence and answers; but it may also

be granted at later stages of the cause. It will, however, be kept in view, that, after the record is closed, it can only be granted to recover documents to prove the averments contained in the record. The time for reporting the diligence is specified in the interlocutor granting it. Although no judgment on the merits can be pronounced before the record is closed, findings relative to the granting or refusal of a diligence may be pronounced; *Kirkland and Sharp v. Fraser*, 27 Feb. 1830, viii. S. 610. At the same time, either an act and commission or a remit is granted to a competent person, to take the deposition of the "Haver," that is, holder of the document. The diligence is prepared and signed by the extractor, and passes the signet. The act and commission must also be extracted; but, when the examination of the havers takes place in Edinburgh, there is no need for an act and commission, a remit which does not require extracting being sufficient, at least in time of session. The A. S. 11 July 1828, § 108, enacts, that the "time specially fixed for reporting a diligence shall not be prorogated, nor the diligence renewed, except on payment of such previous expenses as the Lord Ordinary or Court shall modify, unless, before the elapse of the time so fixed, special application shall be made for such prorogation; and it shall only be granted on cause shewn; and the party failing to report a diligence shall be held to have abandoned his wish to recover writings by a diligence, and circumduction shall be granted for not reporting; and the like rule shall be followed in the case of commissions granted for taking proofs, declarations, or oaths of parties." If the writing called for were of a private nature, as a contract of marriage, the party asking exhibition might be required to shew what interest he had in it, before the haver is bound to produce it; *Crawford v. L. Lamington*, 16 Dec. 1626, M. 3960.

## SECT. IV.—PROCEDURE IN EXAMINATION OF HAVERS.

The process, with the interlocutor containing the remit, or act and commission, being laid before the Commissioner, and due notice being given to the opposite party, a citation is given to the haver to appear; and a schedule is also served on him, specifying the documents he is called on to exhibit. When a proof is granted to both parties, each party ought regularly to take out an act and commission, with relative diligences. The practice, however, is only to take out one act and commission, and two diligences, one for each party. When one of the parties is on the poors' roll, the other is not entitled to take advantage of his gratis commission. On the appearance of the haver before the Commissioner, a clerk is appointed, to whom the oath *de fidei* is administered, and the witness is sworn, but it was not required, even prior to the statute 3 and 4 Vict. c. 59, that he should be purged of partial counsel, as this has no concern with the production of writs.<sup>1</sup> The parties, in general, attend by their agents only; but if the case is one of importance or difficulty, counsel frequently are present; and a fee to counsel in such circumstances is a good article of charge against the opposite party, when he is found liable in expenses; *Smith v. Murdoch, &c.*, 20 June 1829, vii. S. 777. If the haver does not appear, an application is made to the Lord Ordinary, or Court, who granted the diligence, for letters of second diligence, which is of the nature of a caption, authorizing messengers-at-arms, and other executors of the law, to apprehend him and put him in prison, until he find security to appear and depone. Tait's MS. "Probation." Where there

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<sup>1</sup> See the procedure and forms in the examination of witnesses on commission, *supra* p. 354, *et seq.* which are the same, *mutatis mutandis*, as those used in the examination of havers.

is any reason to presume the witness will not appear, first and second diligence will be granted at first.

It is held necessary in practice at present by many, when the time for reporting a diligence is prorogated, that, notwithstanding, a new commission and diligence should be extracted; but it would rather appear, that the effect of the prorogation should be to keep the original warrants in force until the expiry of the renewed period. The extracting of a new commission, or, at least, of a new diligence, in such circumstances, is not unusual in practice.

The writings produced are marked by the Haver, Commissioner, and Clerk, as relative to the deposition. If, however, the documents would be injured by such marking, it may be omitted, on the writings being specified in the deposition, so as to render it easy to identify them.

The questions which may be asked the havers, are,—1. If they have the writs. 2. If they have had them since their citation. 3. If they have fraudulently put them away at any time. 4. If they know, or suspect where they are. 5. If they know by whom the same were taken away; and they must answer all special pertinent interrogatories on these points; and if they admit having had them since their citation, or having fraudulently put them away at any time, they will be decerned to produce them; A. S. 22 Feb. 1688. A person is not bound to answer a question of law, as whether he has any writs tending to interrupt prescription; *Scot v. Lord Napier*, 26 June 1735, and 13 Jan. 1736, M. 3965-6. But he must answer all questions tending to the discovery of the writings, though they may infer against himself *fraud* or *damage*, or involve him in a charge of malversation of office; *Sir Patrick Murray v. His Grandfather's Trs.*, 21 Feb. 1744, M. 16,752; but not if the fact put to him might infer infamy; *Ibid.* The questions to be asked are only such as relate to the recovery of the writing. He cannot be

asked any question as to the merits of the cause, or even as to the contents or tenor of the documents, as this can only be established in an action brought for proving the tenor; Tait, 181. If any part of the deposition be found to be of the nature of evidence in the case, it will be ordered to be struck out; *Dye v. Reid*, 27 Jan. 1831, ix. S. 342; see *infra* P. iii. 9. 2. But it is competent to prove, by the evidence of the witnesses, that a writ has been destroyed; *Boyd v. Anderson, &c.*, 5 June 1823, ii. S. 363, (N. E. 323). On the other hand, a haver will not be allowed to retain the documents, by deponing, that he is not in possession of any which can benefit the party in the question at issue; for this would be to allow the haver to be judge of the import and value of the papers, a thing which cannot be permitted; *Lady M. Campbell v. Earl of Crawford*, 8 Aug. 1783, M. 3973; see *Mackintosh v. Macqueen*, 13 May 1828, vi. S. 784.

Where a haver, on being ordered by the commissioner to produce the documents in his possession, refuses, application must be made to the Court, or Lord Ordinary, to ordain him; and if he still refuses, he is guilty of a contempt, for which he may be imprisoned, till he obey the order.

Though Peers are only bound to give their word of honour, instead of an oath of calumny, and though in England they return their verdict as jurymen, and their answer to bills in Chancery, in the same form, they must give their oaths when they are examined as witnesses in civil or criminal cases, i. Blackst. (1844) 401; or when a reference to oath is made. They must, therefore, be sworn, when examined as havers; *D. of Montrose v. M'Auley*, 19 Dec. 1711, M. 10,029; see A. S. 27 July 1711. Where a Peer does not attend on a first diligence, it would seem that he ought to be liable to be imprisoned for a contempt of court, Burnet, p. 451; but the course followed in two cases, was to ordain him to appear, under a penalty towards the party's damage, by a

certain day, reserving the party's claim for further damages; *Young v. Earl of Bute*, 13 Dec. 1716, M. 10,030. And it would appear, that in all cases where a party disregards the citation as a witness, or haver, he is liable in the damage the party may thereby sustain. This is settled in England. It was once found that the widow of a Peer has the same privileges against imprisonment as the Peer himself; *McDonald v. Widow of a Peer*, 29 July 1756, M. 10,031.

A pupil, it has been found, cannot be examined as a haver; *Aitken v. Hewat*, 9 Jan. 1628, M. 8907. If he has tutors, they ought to be examined instead of him. It has been suggested that where he has none, perhaps a tutor *ad litem* might be appointed,—but this is incompetent; *Supra*, p. 141. A minor after the age of fourteen, may, however, be examined as a haver; *E. of Marr v. His Vassals*, 19 June 1628, M. 8918.

SECT. V.—HAVER ENTITLED TO EXPENSES.

If a haver or witness appear on the first citation, he is entitled to one shilling per day, for his personal charges. If he travel on horseback, he is entitled to the additional sum of 1s. 6d. for each travelling day, and 1s. 2d. for each day he is detained; A. S. 21 Dec. 1765. The court have found this act is still in observance; and that a person who travels in a stage-coach is entitled to the higher rate. But as they considered the allowance too low, the device was fallen on, of allowing the witness seven days to come from Dumfries to Edinburgh, (though he might have come in two on horseback), and seven days to return, at 2s. 6d. per day. But, instead of the allowance of 2s. 2d. per day, while detained, he was only allowed 1s. 2d., which seems to be the allowance for the keep of a horse. He thus received at the rate of 2s. 6d. for each ten miles travelled, the distance being only about seventy miles; *Gordon v. Macfarlanes*, 3 Dec.

1794, M. 16,785. A person who travels on foot, is only entitled to 1s. per day, in full; but, probably, a liberal allowance for time would also be made to him. The witness is entitled to the higher rate of payment if he depone that he is accustomed to travel on horseback, or in a coach, and that he has *de facto* so travelled to his examination; *Chalmers v. Grant*, 11 June 1713, M. 16,734.<sup>1</sup>

<sup>1</sup> In jury trials the sums paid to witnesses are much more liberal. They are fixed by A. S. 10 July 1844, which enacts, § 4, that the allowances to be made to witnesses attending a trial shall be as follows:—(In practice this A. S. is followed generally in *all* cases.)

“(1.) *When the witnesses reside in the town where the trial takes place.*

“Labourers, mechanics, servants, journeymen, &c., per day (according to circumstances), . . . from £0 5 0 to £0 7 6

“Tradesmen, shopkeepers, innkeepers, clerks, farmers, &c., per day, (according to circumstances), . . . from 0 10 0 to 0 15 0

“Superior tradesmen, manufacturers, shopkeepers, auctioneers, &c., per day, from 0 10 6 to 1 1 0

“Gentlemen, merchants, bankers, clergymen, &c., per day, . . . 1 1 0

“Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, engineers, surveyors, &c., per day, . . . 2 2 0

“Females, according to their station in life, per day, . . . from 0 5 0 to 1 0 0

“The above allowances being in full of all the above respective classes of persons shall be entitled to demand for their trouble and maintenance, and no separate charges shall be allowed for tavern expenses, or otherwise, in respect of witnesses.

“(2.) *Where the witnesses do not reside in the town where the trial takes place—*

“They shall be allowed at the above rates for the time necessarily occupied by them in going to, remaining at, and returning from, the place of trial, besides reasonable travelling charges for going



A party in the cause, when examined as a haver, seems entitled to be paid his expenses; *Henderson v. Thomson*, 9 July 1776, v. Sup. 437. The agent of the party who adduces a haver or witness, is personally responsible for his expenses; *Jamieson v. Main*, &c. 12 Feb. 1830, v. Mur. 127; *Megget and Roy v. Douglas*, 20 May 1830, viii. S. 779; and, on application to the Lord Ordinary, he will grant a summary warrant to apprehend and incarcerate him, till payment be made; *Fewars and Merchants of Frazerburgh v. Lord Saltoun*, 19 June 1707, M. 16,712; A. S. 21 Dec. 1765. See *infra*, p. 408.

If the haver has rendered a second diligence necessary, he is not entitled to any allowance; same case and same A. S.; Ersk. iv. 2. 30.

#### SECT. VI.—TERMS OF DILIGENCE.

In the ordinary case the diligence is often granted in gene-

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to and returning from the place of trial, according to their rank and station of life, and with reference to the means of conveyance to and from their respective places of residence, such as steam-boats, railways, &c. : Provided always, that the said allowances for travelling shall not exceed in whole the rate of sixpence per mile for going to, and the same for returning from, the place of trial; and also provided, that, in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants, to make certain investigations previous to a trial, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable; provided that the judge who tries the cause shall, on a motion made to him—either at the trial, or within eight days thereafter, if in session, or if in vacation, within the first eight days of the ensuing session—certify that it was a fit case for such additional allowance.

“ That receipts or vouchers for all the sums stated as paid to witnesses, shall be produced to the auditor at the taxation of the account, otherwise the same shall not be allowed, § 5.

ral terms, as "for the recovery of all writings necessary to support the averments;" but in general a list or "specification" of what is wanted, by date or otherwise, is required. It is of no consequence that the dates are not quite correct, if it is clearly pointed out what papers are wanted; *Lady M. Campbell v. E. Crawford*, 8 Aug. 1783, M. 3973. Where it is obvious, however, that the party has an interest in the writings, he may call for them in general terms. Thus, the ministers of Edinburgh, in an action against the magistrates, for an augmentation of stipend, were allowed to call for production of all charters and grants from the Crown, or from private persons, for the maintenance of ministers; *Ministers of Edinr. v. Magistrates*, 20 July 1763, M. 3969. And a superior, in an action against his vassals for arrears of feu-duties, may demand exhibition of all charters in possession of the vassals which have reddendos of the duties payable to him, or to others in whose right he now stands; *Rose v. Grant, &c.*, 5 Dec. 1781, M. 3971, affirmed on appeal, 15 April 1782, *Ibid.*; see also, *National Bank v. Heath*, 22 June 1832, x. S. 694.

#### SECT. VII.—WHAT WRITINGS MAY BE CALLED FOR.

Regarding the writings which may be called for, there is hardly any restriction. But as our law is unwilling to allow one's charter chest to be inspected, a party's titles, *per aversionem*, can be called for in very peculiar cases only; *Cairncross v. Heatly and Myrtle*, 8 Aug. 1765, v. Sup. 912. See instances of the general rule, *Scot v. Lord Napier*, 26 June 1735, M. 3965, Swinton's Appeals, p. 54, M. Sup. Vol.; *D. of Hamilton, &c. v. Douglas*, 28 Nov. 1761, M. 3966; *Ross v. Ross*, 27 Feb. 1762, M. 3969; for if this were allowed, defects in one's titles might be discovered, and new claims reared up contrary to the rule, *nemo tenetur edere instrumenta contra se*; Ersk. iv. 1. 52. These

are cases in which the question was with the defender alone ; but *a fortiori* a third party cannot be called on to make any such general productions of his titles, *Fisher v. Bontine*, 22 Dec. 1827, vi. S. 330 ; and though there be no limitation in the diligence, the haver may object to comply with a general demand. Even where particular papers are called for, if it is obvious, from their number, or the description of the papers specified in the inventory, that the party is searching at random, and is groping in the dark for something to make out a case, his demand will be refused, although it be limited to certified copies of such of the papers as will throw light on the point at issue ; *Smith and Knight v. Earl of Airly*, 11 Mar. 1815, (not reported) : Tait, p. 178 ; *Scot v. Lord Napier*, *supra*. Diligences of this general kind are what are called “ fishing diligences,” which the Court always oppose, though it is not easy in all cases to see the real nature of the demand. To check such attempts, in some cases a specification of the writs called for, and the purpose for which they are wanted, will be ordered ; *Kennedy v. Hope, &c.*, 8 July 1830, viii. S. 1029. Such diligences will be more especially resisted in the preparation of a cause, and before any distinct averments are made, which the papers to be recovered may prove ; *Mac-kintosh v. Macqueens*, 13 May 1828, vi. S. 784 ; see *Lums-daine v. Balfour*, 13 Nov. 1828, vii. S. 7. To allow a general search at such a period of the cause would be as improper as to authorize a precognition before a magistrate in a civil cause, a proceeding the Court has always discountenanced ; Tait, 381. It would farther be subversive of the rule that a person cannot be called on to produce documents *ad fundandam litem* against himself.

The books of a third party even may be examined, the rule being, that “ whenever, in order to explain a point in dispute between two parties, an inquiry into the transactions

of one of them, with a third, becomes necessary, the books of the latter, if material information be expected from them, must be exhibited, but in such manner as will occasion least inconvenience to him"; *Cadell v. Paul*; 19 Jan. 1799, M. 12,375. In all cases where any prejudice may arise from the public exhibition of the documents, they will be produced to the commissioner only, who will make such excerpts from them as are pertinent to the matters at issue; *Ibid.* and *Relict of W. Paton v. Relict of A. Paton*, 7 July 1668, M. 3963, &c.; *Clark v. Mitchell, &c.*, 17 June 1825, iv. S. 102, (N. E. 103); but the party must make out he has a legal right to demand production of the documents, before they will be allowed to be exhibited to the commissioner to make excerpts, *Mackintosh v. Macqueen*, 13 May 1828, vi. S. 784; and where the party's interest is likely to be injured, they will not be allowed to be called for at all; *Fisher v. Bontine*, 22 Dec. 1827, vi. S. 330. In one case, *Thomson's Trustees v. Clark*, 4 Mar. 1823, ii. S. 262, (N. E. 233), the Court refused to order production of a memorial and opinion of counsel under a diligence; in another, private plans of the pursuer's lands in his own possession; *Ferrier v. Young*, 10 Feb. 1827, v. S. 332, (N. E. 308). The proceedings in a foreign court cannot be called for, as no foreign court has a right to demand that another should part with its proceedings; *Jeffrey v. M'Gregors*, 28 Nov. 1826, v. S. 48, (N. E. 45.) See a special case illustrating several points in this branch of law. *Orrok v. Gordon, &c.*, 12 Nov. 1847, x. D. 35.

"When any deeds, or steps or warrants of extracted processes deposited with the Lord Clerk-Register, are required in processes depending before the (permanent) Lords Ordinary, it shall not be necessary to apply to the Inner house for a warrant for the transmission of such documents; but the Lords Ordinary before whom the causes depend may grant such warrant, when the productions appear to them to be necessary for the ends of justice; provided always, that the motion is in-

timated to the opposite party, and also to the said Lord Clerk-Register, or his deputy, two days before the motion, and that no relevant objection is stated thereto; and the said warrant shall be certified by the clerk, and delivered to the Lord Register, or his deputy, at receiving up the documents;" A. S. 24 Dec. 1838, (*Enrolment of New Causes, &c.*) § 15.

There are two exceptions to the general rule that third parties are compellable to produce documentary evidence in their possession. The first is the case of public boards, as the customs and excise; and the principle of the decision extends to all bodies for the management of the revenue, and to persons holding situations under government. It being a matter of public policy that such boards should have the most ample means of receiving information as to the conduct and character of their officers, no communications to them, even by private individuals, can be called for or exhibited. When this question occurred here, the court held that communications to the board by individuals might be called for, but not the official correspondence with its own superior. In this way, it was impossible to discover the effect of the communication, evidently a most material circumstance in an investigation, *Leven v. Board of Excise*, 8 Mar. 1814, F. C.; *Young and Co. v. Commissioners of Excise*, 27 Feb. 1816, F. C.; *Vass v. Board of Customs*, 20 Feb. 1818, F. C.; but the last of these cases was reversed, 17 July 1822, i. S. App. 229. It would appear to be also settled in England, that no communication to officers in the employ of government, made to them as such, can be disclosed, as information about smuggling, high treason, &c., *Ibid.* In Scotland, it has generally been held, and was, indeed, once decided, that the Lord Advocate may be compelled to disclose his informer, *Steven v. Dundas*, 28 Dec. 1727, M. 7905; and it seems to have been partly in consequence of this opinion that the above decisions were given; but whe-

ther this would be held as law, after the reversal in the case of *Vass*, may be doubted; ii. Hume, 135. In *Gibson v. Stevenson*, 9 Dec. 1822, iii. Mur. 220, the court would not interfere to compel the Lord Advocate to disclose communications made to him by the Secretary of State. See also *Craig v. Marjoribanks*, 13 Mar. 1823, iii. Mur. 342; and *Edwards v. Mackintosh*, 23 Dec. 1823, iii. Mur. 371. A party cannot call on a sheriff to disclose a confidential communication made to him by his predecessor regarding the character of an individual, *Greig v. Edmonstone*, 7 June 1826, iv. Mur. 70. A party who had been apprehended at the instance of a procurator-fiscal upon a criminal charge, brought an action of damages for wrongous imprisonment against him, and moved for production of the principal precognition. Motion refused, as the Crown declined to produce the precognition, and no sufficient cause for its production had been shewn to the Court, *Donald v. Hart*, 6 July 1844, vi. D. 1255. A collector of cess has been held bound to exhibit his books, as being of the nature of public records, and to certify excerpts from them, on being paid his reasonable charges, *Mackintosh v. Mackintosh, &c.*, 4 Dec. 1829, viii. S. 184.<sup>1</sup> As to documents under hypothec, see *infra*, p. 384.

SECT. VIII.—EXAMINATION OF COUNSEL AND AGENT.

Another situation to be considered, is that of counsel and agent. Now, on this point, our practice does not yet seem to

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<sup>1</sup> “ In the course of the strange cause between John Wilson and Archibald M’Lean, parties appealed to the custom-house books at Ayr, by way of probation. The Lords were shy to grant common letters of diligence for production of these books. They were revenue books, and nobody could say how soon public appeal might be made to them. They therefore superseded the application; it being understood, that in the meantime, the parties were to make private application to the Commissioners of the Customs for excerpts or inspection, which, accordingly, they readily granted.”—Tait’s MS. “ Probation.”

have attained maturity; and we shall therefore first mark those cases which do not seem liable to doubt. 1. It is plain the counsel and agent can be in no better situation than the party himself; and they must produce all writings he could be compelled to produce, if they were in his possession, *Kirkwood v. Inglis*, 16 Dec. 1627, M. 342; *Betson v. L. Grange*, 14 Nov. 1628, M. 342; — *v. Rollocks*, 1 Feb. 1666, M. 344. An agent has even been found bound to produce all documents and correspondence in his possession, tending to prove the illegitimacy of his client; but this decision has been held of doubtful authority, *D. of Hamilton v. Douglas*, 9 Aug. 1765, v. Sup. 913. 2. It is equally clear that they cannot be compelled to produce communications by the client in the cause, made to them as counsel and agent; and this rule extends to cases where the communication, though prior to the raising of the action, was made preparatory to, or in contemplation of it, and after the disputes had arisen which led to the litigation. 3. But the difficult question is, whether communications between agent and client, made without reference to, or in contemplation of any suit, can be demanded. In one case, *Bower v. Russell, &c.*, 26 May 1810, F. C., correspondence from the client to the agent was ordered to be produced; the Lord President (Blair) observing, “that communications being made to an agent, and confidentially, was no sufficient reason why production should not be called for; that it was only communications *in causa* which had any privilege in this respect.” In a later case, however, *Exers. of Lady Bath v. Johnston*, 12 Nov. 1811, F. C., an agent was found not bound to communicate correspondence written long before any action was contemplated, upon the ground that it was confidential; and also, in a still later case, the circumstance that the communications were not made in the particular cause in dependence, was held not to be a ground for ordering their production. It was observed, that it was essential to

the safety of suitors that this confidence should never expire, and that the subject matter was protected, whether the suit was the same or not, *Gavin v. Montgomerie and Lindsay Craufurd*, 17 Dec. 1830, ix. S. 213. See also *Kerr v. D. of Roxburgh*, 18 July 1822, iii. Mur. 141; *Wight v. Ewing*, 25 July 1828, iv. Mur. 587; *Cullen or M'Kenzie v. Ewing*, 14 Mar. 1832, x. S. 497.<sup>1</sup> In another case, *D. of Hamilton v. Hamilton*, 25 May 1819, F. C., correspondence by a factor who had management of the estate in dispute, was ordered, on the ground that it depended on the decision of the cause, whether he had acted as factor for the party calling for the correspondence, or for him who resisted the demand; see also *M. of Abercorn v. Langmuir*, 20 May 1820, F. C.; and *Campbell v. Campbell*, 21 Jan. 1823, ii. S. 139, (N. E. 128), and next page. In the cases of *Macintosh v. Macqueens*, 13 May 1828, vi. S. 784; and *Lumsdain, &c. v. Balfour*, 13 Nov. 1828, vii. S. 7, the court were of opinion no such demand could be made at the stage in which the cause then was, before the party had put on record his averments which the correspondence was intended to prove.

Another case, in which counsel and agents are allowed to be examined, is in the expiscation of fraudulent conveyances or transactions, as where an agent is employed to prepare a forged deed, to fabricate an arrestment, or to procure arrestments to be laid on to furnish the client with a ground for retaining a debt, *M'Leod v. M'Leod*, 21 Dec. 1744, M. 16,754; *Keith v. Purves*, Jan. 1684, M. 354; but the rule is different where a party has committed a fraud or crime, and has then consulted a law agent as to his mode of defence; for such a communication will not be ordered to be produced, *Gavin v. Montgomerie and Lindsay Craufurd*, 17 Dec. 1830, ix. S. 213. See as to the examination of counsel and agents in England, Phillips, i. 162; Starkie, ii. 320.

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<sup>1</sup> Reversed on merits, 24 Aug. 1833, vi. W. and S. 566.



In mercantile sequestrations the rules of the common law are superseded by the bankrupt acts, which are of a scrutinizing nature, as is shewn by ordering even the wife to be examined; and in such cases law agents may be examined, when they could not under the common law, *Mackersy v. Mackenzie and Robertson*, 1 Mar. 1823, ii. S. 256, (N. E. 225); under the former bankrupt act. By § 68 of the present statute, 2 and 3 Vict. c. 41, (17 Aug. 1839), "Law agents" are expressly enumerated among the parties who may be examined.

It is only, however, parties in the relation of counsel or agent who have any privilege; for commissioners, factors, trustees, accountants, stewards, servants, &c., are held not to be included under the same rule; *Tait*, 386, *Burnet*, 438, *Al. Prac.* 470, *Wright, &c. v. Arthur*, 15 Dec. 1831, x. S. 139; *Stuart v. Miller*, 26 May 1836, xiv. S. 837. It is perhaps not essential, however, that the party to whom the communication is made be a professional law agent, if he have acted in that capacity; same cases, and *Gavin v. Montgomerie*, and *Lindsay Crawford*, *supra*.

Where parties cannot be compelled to give evidence, or produce documents, they will not be allowed to do so, though willing; as this would be to make the decision of cases depend on the caprice of individuals, and might lead to the most improper proceedings, *Earl v. Vass*, 17 July 1822, i. S. App. 229; *Alison*, *ubi supra*.

When the court grant commission and diligence for the recovery of documents, the qualification that such documents only are to be received as are not subject to the objection of agency or confidentiality is always implied. It is unnecessary to express it in the interlocutor, *McDonald v. McDonald*, 6 Mar. 1844, vi. D. 954.

When papers or title deeds are in the hands of law agents, under lien for their professional charges, the rule seems to be, that they must be exhibited in questions with

third parties, who are noways liable for the agent's charges; but that the client, or those in his right, are not entitled to exhibition of them without paying the account, *Montgomerie v. A. B.*, 1 Mar. 1845, vii. D. 553. See the older cases, M. 6247-48.

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## CHAPTER IX.

### OF THE OATH OF CALUMNY, AND OATH OF PARTY.

#### SECT. I.—OF THE OATH OF CALUMNY.

THE oath of calumny was borrowed from the civil law, and has been known in our practice from the earliest times. The act 1429, c. 125, (c. 16, Th. Ed. ii. 19), ordains advocates, (see *infra*), and also the parties, if present, to swear, "that the cause he trowis is gud and leill." The act of sederunt, 13 Jan. 1692, ordains, that "in case any party require ane oath of calumny upon any alleadgance proponed and found relevant for him, that he may require the party, against whom the same is to be proven, to depone, whether he does not know the same to be true, so that he should not put the proponer to the necessity to prove the same; and if the party against whom any point or alleadgance is to be proven, require the oath of calumny of the party proponing the same, the terms shall be that he may inquire whether he knows the thing that he proposes is not true, so that it were calumnious for him to insist therein."

The oath of calumny may competently be put at any stage of the process, before the cause has been concluded by proof, or before decree circumducing the same, *Stair*, iv. 41. 7; *New Form of Process*, (2d Ed. 1799), 76; and it may be put even after a proof has been led, if it be defective, *Graham v. Logie*, 22 Dec. 1699, M. 9382; but the oath must now be put to the party, and cannot be asked from the advocate; *M<sup>r</sup> Queen*

v. —, 20 Dec. 1764, v. Sup. 902. The court will not allow it to be put, where the sole object seems to be to delay the cause, *New Form of Process*, ubi supra; as where the party is out of the country, *Byron v. Craw*, 24 July 1760, M. 9384. Where a libel consists of various points, the party cannot be called to give his oath upon each point separately, but only generally, upon the whole libel, *Dunn v. Dunn*, 28 Feb. 1835, xiii. S. 590, and older cases, M. 9375, 9376, &c.; and, in a reduction improbation, the pursuer cannot be called on to swear to the truth of his libel until the production is satisfied, for the pursuer's allegation of forgery, &c. proceeds on a fiction of law, the more effectually to enforce the production, *Home v. E. of Home*, 22 Nov. 1716, M. 9383; Ersk. iv. 2. 16. The above act of sederunt farther declares, "that a party is not holden to give an oath of calumny *in facto proprio et recenti*, seeing upon the matter the same resolves in an oath of verity;" *Dunn v. Dunn*, supra. The oath may be required, not only in relation to the averments in the libel and defences, but also as to those contained in the subsequent pleadings; Stair, iv. 44. 15.

The effect of the oath of calumny is, to bar the party from insisting on any part of his libel or defence he admits to be false. If he refuses to give it, he is holden as confessed, and decree may be given against him, as if the averments had been proved. It differs from an oath of verity in this respect, that when a party makes a judicial reference to his adversary's oath, it is held to imply a contract that the cause is to be perilled on the issue of that oath, and no farther probation can be adduced; but, after requiring the oath of calumny, every kind of proof, competent in the circumstances of the case, may be adduced; and, after all, recourse may be had to the oath of verity.

In criminal cases, the oath of calumny cannot be exacted; nor even when actions are pursued only *ad civilem effectum*,

if founded upon acts inferring infamy or personal punishment; and the rules relating to the competency of requiring an oath of verity in such cases, are equally applicable to the oath of calumny.

Oaths of calumny are hardly at present in use; but, perhaps, if combined with judicial examinations, their more frequent exaction might be attended with beneficial consequences.

This oath has been, in some cases, successfully resorted to where the proof of the payment of money rested on unstamped receipts, which could not be regarded in a court of law; for the granter of such receipts will hardly venture to swear that he believes his claim just in face of them, *Duguid v. Mitchell*, &c. 3 June 1824, iii. S. 96, (N. E. 64).

As to the oath of calumny in Consistorial Actions, see *infra* P. iii. 11. B. 2—5.

The declaration of Peers “upon their word of honour seems to be considered sufficient in the case of an oath of calumny or credulity. Tait, 289, and authorities quoted. See next section, *in fin.*<sup>1</sup>

#### SECT. II.—OF THE OATH OF PARTY.

When a party has confidence in the integrity of his opponent, or when he has no other means of proof, he may refer the facts in dispute to his adversary's oath. Such a reference is a judicial transaction between the parties, by which the case is perilled on the deposition to be made. It is not an absolute but an equitable right; *Pattinson v. Robertson*, 4 Dec. 1846, ix. D. 226.

In our older practice, it was not unusual for the pursuer to make a reference to the defender's oath in his summons; and if the party were cited personally, or if out of the country,

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<sup>1</sup> The form of the Oath of Calumny in actions of Divorce, on the head of Adultery will be found, *infra* P. iii. 11. B. 3.

edictally, a decree on such a summons, though in absence, seems to have been held conclusive against the party and his representatives, *New Form of Process*, (2d Ed. 1799), 43; Ivory, i. 239. In the case, however, of *Nicholson v. M'Leod, &c.*, 23 Nov. 1810, F. C., it was held, that a decree in absence, on a summons containing a reference to oath, and served personally on one of the defenders, was not final, but that it was necessary, where the defender did not appear, to make a proper judicial reference, by way of minute. When this minute is lodged and sustained, the Lord Ordinary pronounces an act,<sup>1</sup> ordaining the defender to depone, and grants diligence for citing him. If the citation be personal, (or edictal where the party is forth of Scotland), and he do not appear, he will be held as confessed. Against such a decree he will be reponed, on payment of expenses, if he apply *de recenti*; but if a long interval has elapsed, he will not be reponed, especially if the pursuer can shew he has lost the evidence of witnesses in the meantime. And, even where application is made shortly after decree, the representatives of the defender will not be reponed after his death; Ersk. iv. 2. 17. It is the duty of the party who makes the reference to extract the commission, *Erskine v. Grant*, 11 July 1832, S. Jur. It is now very unusual to make a reference to the defender's oath in the summons; and the above decision shews it is almost useless, as the same form must be gone through, when the defender does not appear, as if there had been no such reference.

A reference to oath may be made at any time between the closing of the record and the extracting of the decree. It is equally competent at the instance of the pursuer or defender. Notwithstanding the Judicature Act, a reference to oath is

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<sup>1</sup> By the term "Act" is generally meant an interlocutor not containing a decerniture.

competent before the Lord Ordinary, although his interlocutor be final; *M'Lennan v. Imray*, 1 July 1826, iv. S. 781, (N. E. 789). A party may now have recourse to his adversary's oath, though he may have unsuccessfully attempted to make out his case by a proof by writ or witnesses, and even after the cause has been decided by the verdict of a jury. Thus, a reference in an action of declarator of marriage at the instance of a woman, to the oath of the man, of facts inferring marriage, was sustained after decree of absolvitor on the written and parole proof; *Gray v. Leny*, 11 June 1801, Hume, 414. See *Fleming, &c. v. Simpson and Kay*, 7 Mar. 1793, Hume, 412; *Dalziel v. Richmond*, 4 Feb. 1792, M. 9407; *Clark v. Hyndman, &c.*, 20 Nov. 1819, F. C.; *Kirkwood v. Wilson*, 26 June 1823, ii. S. 425, (N. E. 378); *Dunlop's Trs. v. Miller*, 2 June 1829, Deas and And. i. 189, but in the last case, the party referring was ordered to pay the whole previous expenses. There is no fixed rule, however, as to previous payment of expenses, *Nisbet v. Taylor's Exrs.* 19 Dec. 1840, iii. D. 332; *Sayer's Assignee v. Haldane and Abbot*, 10 June 1841, iii. D. 1005; *Binnie v. Willox*, 24 Jan. 1843, vi. D. 520. The minute of reference must pass through the single bills in the usual way; *Brown v. Sommerville*, 20 July 1844, *Ibid.* 1438; and in jury cases the proper form of reference is "the issues in the cause, and all facts and circumstances relative thereto;" *Binnie v. Willox, supra.* In *Scott and Livingston v. Donaldson*, 22 Dec. 1831, x. S. 174, it was held, that after a cause has been decided by the court, if a reference to oath is intended, it is not enough to lodge the minute of reference, an incidental petition must also be presented; see also *Campbell v. Campbell, &c.* 11 July 1834, xii. S. 923.

A distinction must be kept in view, where the reference to oath is not made till after the cause has been decided against the party who makes the reference, and a reference

at an earlier period. Before such a decision single points may be referred, though these should not embrace the whole cause, *Cowan v. McCormack*, 21 Nov. 1811, foot note to *White v. Murdoch*, 9 June 1812, F. C.; *Welsh v. Ker*, 17 Jan. 1823, ii. S. 126, (N. E. 119), but, afterwards, the reference must exhaust the whole libel, at least such parts of it as will be conclusive of the cause; *White v. Murdoch*, 9 June 1812, F. C.; *Ogle v. Smith and Co.*, 5 Mar. 1825, iii. S. 629, (N. E. 441); *Butters v. Loch*, 29 May 1830, viii. S. 843. It is not, however, necessary that the party making the reference should depart from any partial decree he may have obtained in his favour, and refer the point on which he has been successful to his adversary, nor can he be required to pay the expenses previously incurred, though the interlocutor against him be final; *Campbell, &c. v. Turner*, 15 June 1822, i. S. 500, (N. E. 465). Where a party has stated a preliminary defence, and afterwards depones upon a reference, without having the preliminary defence reserved, he will be held to have passed from it; *Turnbull v. Borthwick*, 12 May 1830, viii. S. 735. The same rule holds good in objections to diligence; *Allan v. Galli*, 5 June 1829, vii. S. 706.

Farther, there must be a judicial reference to the party's oath, for without such reference the deposition has no weight. *Ford v. His Crers.*, 13 June 1828, vi. S. 969. Thus it has often happened, in examinations of a party as a haver, that questions have been asked him which ought only to have been asked in his examination as a party, and which ought not to have been answered. Such questions and answers ought to be struck out when the commission is reported, *Dye and Mandy. v. Reid*, 27 Jan. 1831, ix. S. 342; but though they are not, neither party can found on them; *Yule v. Robertson*, 13 Nov. 1788, M. 9419; *Thomson, &c. v. Thomson*, 1 Dec. 1829, viii. S. 156. A party may, however, bar himself, by

his own conduct, from pleading that there was no reference, as where the Lord Ordinary, erroneously supposing a reference had been made, appointed the other party to depone, and his adversary acted as if he had in reality made a reference; *Hewit and Napier v. Pollock*, 24 Nov. 1821, i. S. 167, (N. E. 159). See *M'Donald v. Burden*, 23 Jan. 1829, vii. S. 306. An oath taken upon a reference in a submission, where no decree-arbitral has been pronounced, has also been held, in two old cases, such a judicial reference as to bind the parties in a subsequent action in a court of law upon the matter referred; *Wright and Kinloch v. Lindsay*, 2 Jan. 1708, M. 14,033; *Sochan v. Boswell*, 30 Nov. 1709, M. 14,034.

The form of making a reference, whether by the pursuer or defender, is to enrol the cause, and lodge a minute, distinctly stating the points to be referred. The minute will be allowed to be seen. If no objection is made, the reference will generally be sustained, and the party appointed to depone, and, at the same time, a commission, or remit, will be granted to take the oath.<sup>1</sup> If appearance have been entered by the defender, there is no need of citing him to appear, but if not, a diligence must be obtained, and the party ought to be cited personally, to which an edictal citation is equivalent, when he is out of Scotland. If he do not appear to depone, he will be held as confessed, and decree pronounced accordingly.

With regard to what may be competently referred to oath, it must be matter of fact exclusively, for no reference involving a question of law will be sustained. Thus, one cannot be asked whether he is liable for a debt, or whether his ad-

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<sup>1</sup> See *supra*, p. 354, Note, the forms and procedure in the examination of witnesses on commission which are applicable here, *mutatis mutandis*.



versary has been relieved of a guarantee, for these are questions of law; *Taylor and Sons v. Hall, &c.*, 10 Mar. 1829, vii. S. 565; *Conacher v. Robertson*, 27 Nov. 1829, viii. S. 141. See also *Phoenix Fire Insur. Co. v. Young*, 10 July 1834, xii. S. 921, and *Grubb v. Porteous*, 3 Mar. 1835, xiii. S. 603. In some cases, however, it is impossible completely to separate the law from the fact, but it ought to be done so far as the circumstances of the case will permit; *Lawsons v. Murray*, 10 Feb. 1829, vii. S. 380. Farther, the facts referred must be in the record, *M'Farlane v. Watt*, 5 July 1828, vi. S. 1095; *M'Millan v. Stewarts*, 31 May 1815, Hume, 924; *Thomson v. Simpson*, 13 Nov. 1844, vii. D. 106; and they must be sufficient to infer liability; *M'Laren v. Buik*, 20 June 1829, vii. S. 780. When the existence of a debt is referred to oath, the proper form of reference is not that it is "still resting owing," for this assumes that it was once owing, but simply that "it is resting owing;" *Ibid.* The deposition of the party will be strictly confined to what is within the minute of reference; *Megget v. Brown*, 14 Feb. 1827, v. S. 343, (N. E. 318); *Brown v. Moncur*, 29 June 1837, xv. S. 1230; *Mather v. Nisbet*, 16 Dec. 1837, xvi. S. 248; *Johnston v. Law*, 15 July 1843, v. D. 1372; but he is not bound to prove all he refers, but only what is sufficient to make out his case; *Heddle v. Baikie*, 16 Jan. 1841, iii. D. 370.

An oath of reference can only be allowed in a competent process. Thus, suppose a demand for an ordinary debt was made in the form of a summary application, no reference could be allowed in such a process; *M'Farlane v. Watt*, supra. On the same principle, where, in a suspension, a bill has been found vitiated, or granted *ob turpem causam*, or otherwise, it is incompetent in that process to refer to the Suspender's oath, that the sum contained in the bill is really due; for the Court, after holding the bill vitiated, cannot

allow the diligence of the law to proceed on it, and the charger must resort to an ordinary action; *Hamilton v. Main*, 3 June 1823, ii. S. 356, (N. E. 313); *M'Iwham v. Kerr*, 22 Feb. 1823, ii. S. 240, (N. E. 211); *M'Farlane v. Watt*, *supra*; but see *Aitchison v. M'Donald*, 23 May 1823, ii. S. 329, (N. E. 290).

The acceptor of a bill drawn by his brother having been charged by a creditor of the latter, who had taken up the bill after it was past due, presented a bill of suspension, in which he offered to prove no value by his brother's oath; but, in the course of the litigation, his brother having been declared infamous by conviction of a crime, the Court refused to allow the reference to his oath; *Ritchie v. Mackay*, 7 Mar. 1826, iv. S. 534, (N. E. 542): appealed, but the question as to the effect of the conviction and sentence was waived in the House of Lords, 24 June 1829, iii. W. and S. 484.

We have already mentioned, (*supra* p. 362), that, in some cases, the Court allows the evidence of witnesses to be taken to lie *in retentis*; but in one case, where some difficulty occurred on the point, whether the party could be competently required to give his oath, the Court would not authorize his oath to be taken to lie *in retentis* till the point could be decided, though the party was in a very precarious state of health; *Bell v. Syme's Trs.* 10 July 1829, vii. S. 893. It is no good objection to a party's examination on a reference that his faculties are much impaired, if he be not alleged to be *non compos*; nor will the Court instruct the commissioner to report to them the state of the party's health; *Nicholson v. M'Allister, &c.*, 11 June 1829, vii. S. 743. But the deposition will be ordered to be withdrawn, if it has been taken while the party was not in a state of mind in which an oath could properly be administered to him; *Camp-*

*bell v. Arnott*, 17 Feb. 1836, xiv. S. 505. See *M'Ilwham v. Kerr*, *supra*.

In some cases, a reference to oath is incompetent. Thus, wherever a writing is necessary, not merely *in modum probationis*, but as a solemnity, the want of it cannot be supplied by the oath of party; as in the case of instruments of sasine, and in bargains relative to heritage, where there has been no *rei interventus*; *Thomson v. Young*, 18 Nov. 1828, vii. S. 32; see *Stewarts v. Ferguson*, 27 Feb. 1841, iii. D. 668. A sequestrated bankrupt having obtained a discharge on payment of a composition, on the footing that a debt ranked on his estate was due by him, and having been charged for payment of the composition;—held incompetent for him, on a suspension, to refer to oath that the debt was not due; *Gordon, &c. v. Glen*, 19 Jan. 1828, vi. S. 393. Reference to oath is competent where the document of debt is void on the stamp laws; *Parkin v. Clark*, 2 Dec. 1824, iii. S. 355, (N. E. 252.)

Another kind of cases, in which the party's oath cannot be required, is where the fact to be referred is of the nature of a crime, and which, if proved against the party in a criminal court, would infer infamy, or be followed by corporal punishment. But where the consequence of a party's admitting the fact charged, will only involve him in pecuniary penalties or damages, he may be required to depone on a reference, whether the action is prosecuted civilly or criminally; *Ersk. iv. 2. 9*; *M'Eachern v. Ewing and Co.*, 23 May and 17 Dec. 1824, iii. S. 9 and 410, (N. E. 7 and 288); *M'Callum v. M'Call*, 18 Feb. 1825, iii. S. 551, (N. E. 380); *Hamilton v. Boyd, &c.* 28 July 1741, &c., M. 7335; *Logan v. Howatson*, 21 July 1775, M. 10,492, *in fin.* But see *Miller and Smellie v. Brown*, 16 Feb. 1828, vi. S. 561. In our more recent practice, there seems an inclination to refuse to

allow reference to oath, in cases where the facts to be proved are of the nature of delinquencies, though they do not infer legal infamy, and which would be punished in a criminal court merely by fine. Thus, it was held, that a contrivance to defraud the revenue could not be proved by oath of party; *Thomson v. Young*, 18 Nov. 1828, vii. S. 32; see also the cases of *Roger v. Cooper*, 1 July 1823, and *McIlwham v. Kerr*, 22 Feb. 1823, ii. S. 444, (N. E. 396), and 240, (N. E. 211). Although usury also is allowed to be proved by the oath of the *defender*, it is incompetent to refer it to the oath of a pursuer or charger; *Lyall v. Ritchie*, 15 Feb. 1810<sup>1</sup>; 1600, c. 7, (c. 15, Th. Ed. iv. 228).

In examining the party, care must be taken that the special interrogatories are put, before any general question is asked, lest the party be involved in perjury; but although it is irregular, after a general question and answer exhausting a reference, to put special interrogatories, yet if they have been put and answered without objection, it is competent to look at the answers, and give effect to them in determining the effect of the oath; *Heddlie v. Baikie*, 16 Jan. 1841, iii. D. 370. All pertinent interrogatories must be answered, and the examination occasionally extends to great length. It is not enough to depone, that the debt claimed has been paid, or that value has been given for the bill; the party must specify how and when he paid, and what value he gave; *Callander v. Wallace*, 10 July 1717, M. 9416; *Swan v. Swan*, 30 June 1786, M. 9418. See *Fyfe v. Carfrae*, 3 Dec. 1841, iv. D. 152.

As to how far it is competent to refer to documents in taking an oath on reference, see *Hunter v. Geddes*, 29 Jan. 1835, xiii. S. 369. In the later case of *Boyd v. Kerr*, 17 June 1843, v. D. 1213, it was held competent to assist the party's memory as to a date, to question him on a subject, and

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<sup>1</sup> At end of report of *Gordon v. Campbell*, 22 Dec. 1809, F. C., which also see.

shew him a document foreign to the case, though the Court could not consider it with a view of contradicting the oath. See also *Heddl v. Baikie*, 17 June 1847, ix. D. 1254.

Where the points referred have not been exhausted at the first examination, where irregularities have been committed in taking the deposition, or where the deposition is in general or doubtful terms, a re-examination will be allowed for farther clearing the matter, *Turnbull v. Borthwick*, 12 May 1830, viii. S. 735; *Peacock v. Smiles*, 5 July 1828, vi. S. 1081; *Anderson, &c. v. Watson, &c.*, 21 Dec. 1833, xii. S. 273; *Hill v. Cameron*, 15 May 1835, xiii. S. 764; *Young v. Pollock*, *infra*. The party cannot be required to answer special questions, which may involve him in a contradiction of his general denial, *supra*; nor will a re-examination be allowed in any case where the deposition is clear; *Ersk. iv. 2. 15*; *Wemyss v. Maitland*, 30 Mar. 1639, M. 9393.

After a reference to oath, and the emission of a deposition, it is incompetent to refer to and connect the statements of the deponent in the record with the deposition, *Young v. Pollock*, 25 May 1832, x. S. 570.

A party will, in general, be allowed to retract a reference to oath, at any time before it is emitted, upon payment either of the previous expenses, or at least of the expenses occasioned by the reference, *Chalmers v. Jackson*, 18 Feb. 1813, F. C.; *Bennie v. Mack*, 28 Jan. 1832, x. S. 255. But he will not be permitted, where the object in retracting is evidently to gain an improper advantage, *Galbraith v. McNeill*, 26 Nov. 1828, vii. S. 63.

References to oath are often resorted to, for the purpose of obtaining delay. By the A. S. 11 July 1828, however, the time for reporting the oath is always specified in the interlocutor appointing the party to depone; and the time cannot be prorogated, except on payment of expenses, unless application be made for a prorogation to the Lord Ordi

nary or Court, before the elapse of the time fixed ; and it is only granted on cause shewn ; § 108. If, during the period so assigned, the party referring does not proceed with the reference, his adversary may either enrol the cause, and obtain circumduction,<sup>1</sup> or he may extract the act, and after due intimation to the other party, appear and depone. Where decree has been pronounced against a party, on account of his failure to appear and depone,<sup>1</sup> he will be reponed in general, only on payment of the previous expenses, *Drummond v. Gilmour*, 28 Jan. 1832, x. S. 266 ; *Miller v. Cooper*, 29 Jan. 1835, xiii. S. 369. Where a defender was reponed against decree, on condition of deponing, but died before doing so, it was held, in a question with his representative, that as he could not now be reponed, the decree against him was effectual, *Grant v. M'Gregor*, 20 June 1839, i. D. 1048. Where the agent of the party referring refused to proceed with the examination on the day fixed by the commissioner, on account of his client's absence, the Court remitted to the commissioner to fix a new diet, upon the party referring paying ten guineas of expenses, *Wighton v. Smith*, 20 Dec. 1844, vii. D. 235.

When the reference has evidently been tendered only to create delay, more especially when the party to whom it is made is out of the country, the court will either refuse the reference altogether, or only admit it, on consignment of the sum in dispute, *M'Kenzie v. Mackintosh*, 3 July 1828, vi. S. 1057 ; *Mainwaring, &c. v. Baxter*, 4 Feb. 1812, F. C.

The effect of reference to oath is conclusive of the interest referred. Not only can no farther proof be adduced, where

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<sup>1</sup> The proper form of interlocutor here is this :—" In respect the . . . has failed to take the oath of the . . . , circumduces the term against him, and allows the decree formerly pronounced to go out and be extracted, with additional expenses," &c.

the deposition is clear ; but the party referring may be required, before his adversary is called on to depone, to make oath that he has no farther probation ; Stair, iv. 44. 2. A person who swears falsely, may, however, be tried for perjury ; and, in such a trial, the criminal court will award damages to the party injured by the false oath ; i. Hume, 373. Where the oath, however, is not positive and clear, as a *non me-mini*, for example, other proof will be allowed, *Fisher v. Lithgow*, 19 July 1672 ; *Thomson v. Currie*, 27 Jan. 1677, M. 12142-3 ; *E. of Melvil v. E. of Perth*, 28 Dec. 1693, iv. Sup. 171 ; *Stewart v. Macwhirter*, 4 Dec. 1713, iv. Sup. 914, and v. 99 ; *Brown v. Paterson*, 2 June 1809, Hume, 469.

As to the effect of a party deponing, on a reference, that he has, through a third party, paid the debt, see *Smith v. Ivory*, 26 Nov. 1807, Hume, 462 ; *Mette and Carl, &c. v. Dalzell*, 26 Jan. 1830, viii. S. 387.

A party, to whose oath a point is referred, may defer it back to his adversary. This will not, however, be allowed, where it appears that the party to whom the reference has been made, had the best opportunity of knowing the fact ; Stair, iv. 44. 13 ; Ersk. iv. 2. 8.

It is to the oath of the debtor only that in general a reference can be made. But there are various exceptions to this rule. Thus, a wife being *preposita rebus domesticis*, not only the furnishing of goods upon her order, but the existence of the debt when prescribed, may be referred to her oath ; *Young, Trotter, & Co. v. Playfair*, 2 Dec. 1802, M. 12,486. On the same ground, furnishings to a wife or to children *in familia paterna* may be proved by their oaths ; *Lauder v. Chalmers*, 24 Jan. 1685, M. 12,481 ; and *Hopkirk v. Deas*, 14 Jan. 1698, M. 12,482 ; even though the wife or children be not parties to the process. The oaths of magistrates and tutors may also be resorted to, as to deeds

done by themselves; *Johnston v. Dean of Guild of Aberdeen*, 13 Jan. 1676, M. 12,480; *Hepburn v. Hamilton*, 12 Dec. 1661, M. 12,480. On the other hand, the oath of one obligant affects his own interest only, and does not affect that of those who may be bound along with him. An oath of a wife admitting the existence of a debt contracted by her before marriage, will only affect her own separate estate, but not her husband; *Ersk. iv. 2. 10*; *Morrice and Husband v. Munro and Son*, 2 Dec. 1829, viii. S. 156; *Munro v. M'Leod*, 10 Feb. 1809, Hume, 215; *M'Intyre v. Graham*, 3 Mar. 1795, *ibid.* 203. In *Murray v. Laurie's Trs.*, 2 Mar. 1827, v. S. 515, (N. E. 484), a reference to the oath of the trustees of a party deceased was allowed as to the resting-owing of a bill of exchange, reserving all objections to the effect of the oath when taken. See also *Fleming, &c. v. Simpson and Kay*, 7 Mar. 1798, Hume, 412. Under a reference to the oath of road trustees, it was held incompetent to examine one of them as to matters not known to him as a trustee, but with which he had previously been conversant, in another capacity; *Hotson v. Threshie*, 16 Nov. 1833, xii. S. 57. It is incompetent to refer to the oath of a judicial factor matters involved in an action to which he is a party, but arising prior to his appointment; *Stewart, &c. v. Symes*, 12 Dec. 1815, F. C. It is incompetent in an action at the instance of a principal to refer to the oath of the agent with whom the contract libelled was made, as to what its terms were, *Kirkwood v. Wilson*, 26 June 1823, ii. S. 425, (N. E. 378). But a reference was held competent to the oath of a party, for whose behoof a charge on a bill had been given by his agent; *Innes v. Lawson*, 9 Feb. 1828, vi. S. 513. A tenant pursued, along with his cautioner for rent, after the lapse both of the quinquennial and septennial prescription, having, in an oath of reference, stated that the cautioner had conducted a sale of his stock, out of which he considered the rent to have been satis-



fied, it was held incompetent to prove resting-owing by the oath of the cautioner; *Cochrane, &c. v. Fergussons*, 24 Feb. 1831, ix. S. 501. Where the existence of a debt has been referred to one of the partners of a dissolved company, who depones *negative*, he is entitled immediately to decree of absolvitor, notwithstanding the action is still in dependence against the other partners; *Easton v. Johnston, &c.*, 15 Feb. 1831, ix. S. 440; see *Gow v. M'Donald*, 27 Feb. 1827, v. S. 472, (N. E., 445). The oath of the cedent is not allowed to affect the assignee, unless it has been made before the assignation is intimated, or the assignation be gratuitous, or if, before intimation of the assignation, action have been brought against the cedent, on the same grounds on which he opposes the assignee's claim; Tait, 267; but in the case of arrestments, the arrestee may refer his defence to the oath of the common debtor, for the debt can only be arrested, as it stands in his person; Tait, 257; *Hogg v. Low*, 13 June 1826, iv. S. 702, (N. E. 708). But a reference by an arrestee to the oath of his brother, the common debtor, (who had absconded to America on a charge of fraudulent bankruptcy), that he owed him lent money to the extent of about £120, while the sum arrested was about the same amount, was refused; *Spalding v. Shaw*, 15 Feb. 1805, Hume, 501. It is now settled, on a review of the previous authorities, that it is incompetent to refer a debt to the oath of a sequestrated bankrupt; *Adam v. M'Lachlan*, 29 Jan. 1847, ix. D. 560, and in *Robertson v. Thom*, Dec. 1847, outer-house, Lord Wood (not reported), the oath of an insolvent party, who had executed a trust-deed for the general behoof of his creditors, was held inadmissible. It may be stated as a general proposition that where a party is so situated as to be examinable as a witness, a reference to his oath will not be allowed; *Borthwick, &c. v. Christie, &c.*, 12 June 1838, xvi. S. 1136.

Oaths of all kinds are generally taken before a commissioner, or before a person to whom a remit has been made.<sup>1</sup> Peers, as well as minors, must swear on a reference; but a pupil cannot be required to give his oath. It was held that claims on bills and open accounts made in a ranking and sale, brought by an apparent heir of his ancestor's estate, but which were prescribed, could not be proved by the oath of the heir, who was in pupillarity at the time of his ancestor's death, and was still minor, *Little v. Graham, &c.*, 4 Feb. 1826, iv. S. 424, (N. E. 429). Quakers and Separatists are allowed to give their solemn affirmation; Tait, 289; 3 and 4 Wm. IV. c. 82, (28 Aug. 1833). See last Sect. *in fin.*

#### SECT. III.—OATH IN SUPPLEMENT.

We may shortly mention two other kinds of oaths which are sometimes used in our supreme court,—the oath in supplement, and the oath *in litem*. The oath in supplement is allowed where it is proved that there has been a course of dealing between the parties, and the object is to make out the particular quantities and values of the articles furnished; and many cases have occurred where shopkeepers have been allowed their oath in supplement of the proof of the prices or quantities of goods furnished, established so far by the evidence of their books, and apprentices or servants; M. 9371, &c.: See also *Buchanan v. Buchanan*, 7 Feb. 1812, F. C. But an oath in supplement was not allowed, where the proof of a single bargain or transaction was defective; *Cameron v. Anderson*, 20 Jan. 1815; Hume, 421; or where the object was to subject the defender in payment as a guarantee, *Buchanan and Co. v. Scott*, 15 May 1816; Hume, 422. As to the competency of an oath

<sup>1</sup> The forms of procedure are the same, *mutatis mutandis*, as those in examining witnesses on commission, *supra*, p. 354, Note.

in supplement in an action for payment of a law agent's account, see *Limond v. Reid*, 22 Dec. 1821, i. S. 232, (N. E. 220). A pursuer was held entitled to supply, by his oath, a defect in evidence arising from the suspicious disappearance of a book in the custody of the defender; *Calder v. Calder*, 20 Dec. 1825, iv. S. 331, (N. E. 336). In *Balfour v. Sharp*, 26 June 1833, xi. S. 784, it was held that toll books, made up daily, of the number and weight of carts passing the bar, from jottings taken as each cart passed, were sufficient, with the oath of the keeper in supplement, to prove the amount of carriage on which toll dues had been incurred during the year.

The oath in supplement has also been allowed in some peculiar cases, to make out the proof of the intimation of the dishonour of bills of exchange, which was partly proved by private markings on the bill; *Colebrook v. Douglas*, 18 July 1780, M. 9374 and 1605; *Douglas, Heron and Co. v. Alexander*, 13 Feb. 1781, M. 9374; Thomson, 481. Proof by oath in supplement is also allowed in actions in regard to the paternity of natural children. See *infra*, P. v. 3. e.

#### SECT. IV.—OATH IN LITEM.

The oath *in litem* is allowed where there is evidence that the defender has been engaged in some illegal act, as an unwarrantable intermeddling with the pursuer's goods, or in questions on the edict *nautæ, caupones, stabularii*, Tait, 279; *Scott v. Gillespie*, 16 May 1827, v. S. 669, (N. E. 624); *Gowans v. Thomson and Heiton*, 6 Feb. 1841, vi. D. 606. The object of it is to prove the amount of loss or damage sustained by the pursuer. In the first set of cases, it is essential that the party have been engaged in some illegal act; *Lyle v. Graham*, 12 June 1824, iii. S. 125, (N. E. 84); *Douglas v. Walker*, 16 Feb. 1825, iii. S. 534, (N. E. 370); and in the second, there must either be some

proof of value, or of theft, or violence. Before allowing the pursuer to give his oath *in litem*, he must lodge a condescence of the amount of his damage, or of the value of his goods, which the Court will tax, and then his oath *in litem* is admitted; *New Form of Process*, (2d Ed. 1799), 120. If the case go to a jury, the pursuer may be examined before them: *Crawcour v. St. George Steam Packet Co. and McKean*, 30 July 1842, v. D. 10.

The proof arising from an oath of supplement, may be redargued by other proof; Tait, 279. A sentence proceeding on such an oath, or an oath *in litem*, may be brought under review, on the ground that the oath ought not to have been put; Tait, 279, 287.

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## CHAPTER X.

### OF JUDICIAL EXAMINATIONS, REMITS, AND REFERENCES.

#### SECT. I.—OF JUDICIAL EXAMINATIONS.

JUDICIAL examinations of the parties, though seldom resorted to in the supreme court, are not unusual in the inferior courts. It is in all cases, matter of discretion with the Court, whether such an examination should be allowed. It is not matter of ordinary process, which the parties may demand as matter of right, but is resorted to only in special cases. Such examinations are generally ordered, in cases where there appears suspicion of fraud, or improper concealment, or where the transactions between the parties have been of a confidential nature, as between co-partners; *Wilson v. Beveridge*, 19 Feb. 1831, ix. S. 485; *Barrie v. Tait*, 28 Nov. 1843, vi. D. 102. See *A. B. v. C. D. infra*. The proper use of such an examination is, to supersede the

necessity of proof, or to afford aid in the investigation ; and, in the ordinary case, the proper time for taking the examination is at the outset of the cause, or after the record is prepared, but not closed ; *Livingston or Menzies v. Livingston*, 18 Jan. 1832 ; though, if strong suspicions are thrown on a party in the course of a proof, it is perhaps competent to examine him after the proof has been led ; *Campbell v. Hill*, 29 Nov. 1826, v. S. 54, (N. E. 50). After a woman has given her oath in supplement, in a case of filiation, (*infra*, P. v. 3. E), she cannot be judicially examined ; *Jameson v. Barclay*, 14 Jan. 1820, F. C.

In some cases, judicial examinations cannot be allowed ; as in actions founded on facts which, if prosecuted criminally, would infer infamy, or punishment ; *Gordon v. Campbell*, 22 Dec. 1809, F. C. ; see *Little v. Smith*, 17 Feb. 1847, ix. D. 737. It has been said that in actions of divorce, (on the ground of adultery), a judicial examination is not competent, as the ground of the action is a criminal act, and may be punished as such ; *Lothian*, 251, but this statement is not supported by the practice ; *Fraser*, i. 700. In actions for the constitution of marriage, a judicial examination is frequently ordered ; *Lothian*, *supra* ; *A. B. v. C. D.* 23 Dec. 1843, vi. D. 342, and 2 Mar. 1844 ; *Ibid.* 932. In the Commissary Court judicial examinations were allowed more indiscriminately than they will be in the Court of Session ; *Ibid.* It has been found, that a party cannot be examined as to usurious transactions, *Nisbet and Buchan v. Cullen*, 1 Feb. 1811, F. C. ; though usury may be proved by the oath of the defender ; 1600, c. 7, (c. 15, Th. Ed. iv. 228) ; *supra* p. 395. It has sometimes been attempted, in actions for money alleged to be embezzled, to examine the defender from what source he derived funds of which he was possessed ; but, independently of the objection arising from the penal consequences which such an examination might possibly bring

on the defender, the inquiry is irrelevant, for the defender might have acquired the funds by other means, which no court can require him to disclose, and the examination could not, therefore, legally be ordered under the certification that the party is to be held as confessed, if he decline to answer, *Gordon v. Campbell*, supra; *M' Candlish v. Forbes*, 2 June 1825, iv. S. 58, (N. E. 59). Where, however, a party runs no risk of being punished in the criminal court, he may be examined judicially, though the facts charged amount to a crime. Thus, suppose the defender has been engaged in a robbery, and, by turning evidence against his accomplices at the trial, he is absolved from all the penal consequences of his crime; in a civil action against him, for restitution of the stolen property, he may be judicially examined under the usual certification, *Jantzen v. Easton*, 3 Feb. 1814, F. C.

Neither can judicial examinations be allowed in those cases in which the only competent evidence is the writ or oath of the party. Thus, suppose prescription is pleaded against an account, it is incompetent to appoint a party to be judicially examined, until the plea of prescription is repelled, *Hamilton v. Hamilton*, 13 Nov. 1824, iii. S. 283, (N. E. 199). Or, suppose the action is for lent money, the same rule applies; *M' Master v. Brown*, 28 Jan. 1829, vii. S. 337. Thus, also, as the presumption is that the holder of an indorsed bill is an onerous indorsee, and which can only be redargued by the writ or oath of the holder, his judicial examination cannot be permitted, not even although there may be vague allegations of fraud, *Goodfellow v. Madder*, 27 July 1785, M. 1483. On this ground, also, after a party has led a proof, he cannot in general ask for a judicial examination, his only resource then being the party's oath, *M' Intosh v. Mackinlay*, 27 May 1823, ii. S. 339, (N. E. 298).

But as the rule is, that a judicial examination may be ordered whenever a proof by witnesses is competent, and such

a proof is admitted in all cases of wrong and fraud, in which it cannot be expected that the party injured could obtain written evidence, a judicial examination will be allowed, even in the case of indorsees of bills, where an allegation of fraud is pointedly and relevantly stated, *Goodfellow*, supra; *Campbell*, &c. v. *Turner*, 24 Jan. 1822, i. S. 265, (N. E. 249); *Campbell*, &c. v. *Hill*, 29 Nov. 1826, v. S. 54, (N. E. 50); *Fell*, &c. v. *Lyon*, 16 Feb. 1830, viii. S. 543; but not where it is vaguely averred, *Dunlop v. Reids*, 13 June 1827, v. S. 736; *Scotts v. Dun*, &c., 13 May 1837, xv. S. 924; *Barrie v. Tait*, 28 Nov. 1843, vi. D. 102.

The proper time for a judicial examination is generally *in initio litis*, after the defences are lodged, and before closing the record. The party alone can be examined, and the court highly disapproved of the examination of a party's agent and wife; *M'Master v. Brown*, 28 Jan. 1829, vii. S. 337. Sometimes both parties are allowed to be examined at the same time; *Wilson v. Beveridge*, 19 Feb. 1831, ix. S. 485.

#### SECT. II.—OF JUDICIAL REMITS.

In many cases, it is necessary to have recourse to the assistance of professional engineers, architects, and other men of skill, to clear the points in dispute among litigants. It is the practice of some of the judges to require the consent of both parties to such remits; and where such consent is given, the parties are precluded from all farther probation, even on payment of previous expenses, *Dixon v. Monkland Canal Co.*, 16 Nov. 1821, i. S. 145, (N. E. 141), affirmed on appeal, 29 June 1825, i. W. and S. 636. If the conduct of the persons to whom the remit has been made were grossly wrong, perhaps a remit might be made to other individuals, as this is the same mode of proof, although it would only be in a very strong case that such a course would be permitted. On pointed and specific allegations of error, of neglect of the

directions of the remit, or that the points remitted have not been exhausted, a new remit will be made to the same person, to reconsider his report, *Rowat v. Whitehead*, 17 Nov. 1826, v. S. 19, (N. E. 18), *Dixon*, supra; *Hunter v. Exers. of D. of Queensberry*, 20 Nov. 1827, vi. S. 89; *Meason and Barker v. Exers. of D. of Queensberry*, 22 Dec. 1827, vi. S. 326. See *Halkett v. E. of Elgin*, 9 Feb. 1831, ix. S. 412; *Thomson v. Moffat*, 13 Dec. 1831, x. S. 124; *Wilson and Son v. Struthers and Son*, 10 Feb. 1837, xv. S. 523. Where two inspectors, under a judicial remit, were at issue with each other, and had returned an incomplete report, the court conjoined a third party with them, and remitted of new; *Muir v. Anderson*, 26 Nov. 1833, xii. S. 129. The court refused to allow a jury trial, after a remit to a man of skill, to report as to the work for which a tradesman claimed payment, *Mackintosh v. Lady Ashburton*, 1 Mar. 1834, xii. S. 518. In special cases, also, farther proof has been admitted, *D. of Buccleuch v. Pringle, &c.*, 17 May 1827, v. S. 677, (N. E. 632). After the report has been approved of by the court, it is of course incompetent to bring forward objections to it, *Hunter v. Cochrane's Trustees*, 18 Feb. 1831, ix. S. 477. The persons to whom a remit is made may be put on oath, if either party require it; *Meason*, supra, and he is entitled to decree for his account against both parties, conjunctly and severally, even though one of them may have opposed the remit, *Brown v. D. of Gordon*, 2 Mar. 1827, v. S. 514, (N. E. 483).

Remits to accountants, as well as to men of skill, may be made either before or after the record is closed, in the discretion of the Lord Ordinary or Court; *Mackintosh v. Macqueens*, 6 Mar. 1830, viii. S. 668. The agents for the parties were formerly held to be conjunctly and severally liable in payment of the fees of an accountant, to whom the cause might have been remitted, even although they had intimated



to him, at the date of the remit, that he must not look to them for payment. The only way to get quit of this liability was to give up the agency; *Milne v. M'Lean*, 31 May 1825, iv. S. 45, (N. E. 46). The situation of an accountant, in such cases, was held to be similar to that of an officer of court, for whose fees the agent is primarily liable. An agent who received a report from an accountant, and used it for his client, though not agent in the cause at the date of the remit ordering the preparation of the report, was in like manner held liable for payment of the accountant's fees; *Scott v. Robertson*, 25 June 1829, vii. S. 796. In such cases, the accountant was allowed to appear in the action in which the remit had been made, and crave decree. But by A. S. 19 Dec. 1835, *in fin.*, it is now declared "that the agent is not, without special agreement, to be held personally responsible to an accountant, engineer, or other reporter, to whom a remit may hereafter be made by the Court on matters of fact, in a depending process, where the agent has authority to bind the party;" see *supra*, p. 353, Note. This rule supercedes the decisions in *Milne v. M'Lean*, and *Scott v. Robertson*, *supra*. An accountant has been held to have a right to retain the documents which have been put into his hands, until his account be paid; *Stewart and Curators v. Stevenson*, 23 Feb. 1828, vi. S. 591.

When a remit is made to a clerk of Court to make investigations, prepare a report, &c., his charges are regulated by the time and labour required, and are in all cases taxed by the auditor, and paid into the fee fund, 1 and 2 Vict. c. 118, (16 Aug. 1838), § 13.

Where, "in any case, a report has been obtained from an accountant, or other professional person, and the parties, or either of them, shall be dissatisfied with the report, the cause shall be enrolled before the Lord Ordinary for debate on the report, and a note of the objections shall be furnished to

the opposite party forty-eight hours before the enrolment; and at the time of enrolling the cause, a copy of the note of objections shall be furnished to the Lord Ordinary's clerk, for his Lordship's use; and upon hearing parties, the Lord Ordinary may order cases, or otherwise dispose of the note of objections, as he sees cause;" A. S. 11 July 1828, § 67.

SECT. III.—OF JUDICIAL REFERENCES.

To avoid the expense and delay of proceedings in Court, especially in cases which are better fitted for the investigation of men of skill, or accountants, than lawyers, the parties sometimes agree to a judicial reference. This may be done at any stage of the process, and either before or after closing the record. The form of carrying the matter into effect is by lodging a minute signed by the parties or their counsel, referring the process, or a part thereof, to the person agreed on,<sup>1</sup> and the Lord Ordinary interpones his authority to the reference. As to the right of a party to resile from a minute of reference, before the authority of the judge has been interponed to it; see *Reid v. Henderson*, 26 June 1841, iii. D. 1102. The referee may either report to the Lord Ordinary the terms of the judgment he thinks should be pronounced, or he may pronounce an award. In either case the authority of the judge is interponed. Where the referee has not exhausted the matter referred to him, where he has misapprehended the nature or object of the reference, or where the award or report is ambiguous, a new remit may be made.

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<sup>1</sup> "Parties procurators hereby refer this process to the determination of A. B., as judicial referee, (signed) C. D.—E. F."

"The Lord Ordinary interpones authority to the minute of reference for the parties, and in terms thereof remits the process to A. B. as judicial referee therein. Grants warrant to the said referee to take such probation as the justice of the case may require; grants diligence against witnesses and havers, and appoints him to report his opinion to the Lord Ordinary, *quam primum*."

Or if the referee has omitted or refused to hear the parties, they will be allowed an opportunity of objecting before the Lord Ordinary, when application is made to him to interpose his authority to the referee's award, and the case will be sent back to the referee; *Glennie v. M'Phail*, 24 Feb. 1825, iii. S. 574, (N. E. 395). Aff. on merits, 11 Mar. 1829, iii. W. and S. 389; *Baxter v. M'Arthur*, 20 Feb. 1836, xiv. S. 549; *Lyle v. Neilson*, 15 June 1844, vi. D. 1163. The process, of course, continues in dependence during the reference, and care should be taken, by getting the remit renewed *pro forma*, that it does not fall asleep. The court cannot review the award of a judicial referee, *George v. Milne*, 4 Feb. 1836, xiv. S. 404; *Watmore v. Burns*, 2 Dec. 1841, iv. D. 150. When a motion is made for the court to interpose its authority to the award of a judicial referee, it is competent to object to the award on any ground which would be competent and sufficient for setting aside an extrajudicial decret-arbitral, without the necessity of raising, as in that case, a formal action of reduction, and it was observed, that it is an established principle in Scottish law, that where the award is clear in its terms, correct in its form, embracing nothing which was not referred, and exhausting all that was referred, it is not competent for the court to review it on its merits, *Macenzie v. Girvan*, 19 Dec. 1840, iii. D. 318. The award of a judicial referee is equally as a decret-arbitral, protected from being set aside on any ground, except bribery, corruption, or falsehood, both being founded on the principle of the contract of parties to refer the whole matter in dispute to the final decision of the arbiter or referee, who is entitled to regulate the details of the procedure, and the Act of Regulations, 1695,<sup>1</sup> applying equally to both, *Brakinrig v.*

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<sup>1</sup> A. S. p. 215.—Alexander's Abridgt: of A. S., Apx. p. 185.

*Menzies*, 17 Dec. 1841, iv. D. 274. In the same case, in a question on the relevancy of objections to the award, it was held, that the party objecting was not entitled to produce the notes which had been issued by the referee, prior to pronouncing his award, but that the matter alleged to be contained in them might be verbally referred to; and an opinion was indicated, that if an award were set aside by the court refusing to interpose its authority, the reference would not fall, if a good award could still be obtained. See also *Campbell v. Campbell*, 9 Feb. 1843, v. D. 530; *Wauchope v. Stenhouse, &c.*, 16 June 1846, viii. D. 816. If a commission or diligence is therefore wanted, it will be granted on an application to the Lord Ordinary. If either party dies, the reference does not fall, *Taylor v. Whatmore*, 17 May 1839, i. D. 743; and the process must be transferred in common style. Though a party may be entitled to be heard before the Lord Ordinary or Court before authority is interponed to the award, where any irregularity has been committed, or when there is an ambiguity in the award, such hearing will not be allowed, where every thing has been correctly done. Where a party, who wished to be heard by the Court, had consented to the referee merely taking short notes of the evidence for his own guidance, his request was refused, for he, by his own act, had rendered it impossible that a hearing, on the import of the evidence, could take place, *Flounders v. Flounders*, 14 Feb. 1826, iv. S. 459, (N. E. 464). Where inhibition or arrestment has been used on the dependence of an action, it is not injured by a judicial reference, for the action is not discharged, and the diligence covers the sum which is ultimately found due, if liquidated in the process by the sentence of the judge, *Reids and Campbell v. Napier*, 3 July 1751, M. 6993, *Stewart v. E. of Galloway, &c.*, 16 Feb. 1770, M. 7004, i. Hailes, 343. A cautioner in a suspension, who had granted

the usual bond for the sums charged for, in case the suspender should be found liable by the Court, "after discussing the letters of suspension," and for "whatever sums the Lords shall modify in name of damages and expenses," was held not liable for these sums, under decree of the Court, proceeding on the award of a referee, in a judicial reference entered into by the suspender without his knowledge or consent, *Stewart v. Hickman and Marriott*, 1 Dec. 1843, vi. D. 151; but see *Potter v. Bartholomew*, 17 Nov. 1847, x. D. 97.

Though a reference may have been made of a cause depending in the Jury Court, on a remit for trial, as "a concluded cause," the referee may allow a proof; and he is also entitled, in a reference of the whole cause, to award expenses, though not specially authorized in the minute of reference, *Smith v. Banks*, 15 June 1830, viii. S. 920; *Berry and Sanderson v. Watsons*, 26 Jan. 1831, ix. S. 337, Parker, 201-14; *Edinburgh Oil Gas Light Co. v. Clyne*, 28 June 1832, x. S. 723; reversed, on other grounds, 27 Aug. 1835, ii. S. and M'L., 243; *Fairley v. M'Gown*, 11 Feb. 1836, xiv. S. 470; *Robertson v. Broun*, 6 Dec. 1836, xv. S. 199; *Ferrier v. Alison*, 18 April 1845, Bell, App. iv. 161.

It is competent for the Court, in a cause which has been judicially referred, to decern against the one party for half of the fee to the referee, which has been wholly paid by the other, *Drummond v. Leslie*, 11 Mar. 1835, xiii. S. 684. A judicial referee, to whom the question of expenses was specially remitted, as well as the merits, found one party liable to the other in expenses, "inclusive of the fee" to the referee, "if it shall be the pleasure of the court to find him entitled to remuneration:" the award farther remitted to the auditor to tax the expenses. It was held, that the finding as to the referee's own fee was competent; that the authority of the court should be interponed to the award,

and a finding being pronounced that the referee was entitled to remuneration, a remit was made to the auditor to tax the expenses accordingly, *Baxter v. Macarthur*, 1 June 1838, xvi. S. 1085.

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## CHAPTER XI.

### OF THE PROCEDURE IN ADMIRALTY AND CONSISTORIAL CAUSES.

#### A.—ADMIRALTY ACTIONS.

By the statute 11 Geo. IV., and 1 Wm. IV. c. 69, (23 July 1830), § 21, &c., the High Court of Admiralty<sup>1</sup> was abolished, and the jurisdiction in all maritime civil causes and proceedings was transferred to the Court of Session, except in causes not exceeding in value £25 sterling, which, it was declared, should be instituted and carried on, in the first instance, before the sheriff, in the manner directed, and with the exceptions specified in the act 1672, c. 16; *supra*, p. 6. See *supra*, P. i. 2. 3. And it is farther declared, that all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills.

In ordinary petitory actions, the only peculiarity in maritime cases is, that the defender is not entitled to enter upon his defence until he find caution *de judicio sisti et judicatum solvi*, i. e. that he will be present at the diets of court, and pay the sums to be awarded against him by the judge; 1681, c. 16, (c. 82, Th. Ed. viii. 351), Ersk. iii. 3. 73; *infra*, sect. ii.

#### SECT. I.—WHAT CAUSES MARITIME.

Under maritime actions are included all questions relative to policies of insurance on ships and on goods sent by sea, freights, salvages, wrecks, bonds of bottomry; all contracts

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<sup>1</sup> For the History of the High Court of Admiralty, see Bankt. iv. 12. 1, &c.; Ersk. i. 3. 33, &c.; Boyd, 1, &c.; Bell, Com. i. 497.

relative to the lading or unlading of ships; questions with seamen or mariners, relative to their wages or employment on shipboard, delivery of goods sent by sea, or for recovery of their value; actions for payment of repairs on a ship; *Gavin and Son v. Sword, &c.*, 19 Dec. 1835, xiv. S. 187; or for provisions furnished for the use of the crew; questions relative to claims of ship's husbands for such repairs or provisions; actions for the sale of ships; against brokers for improper delaying to effect insurance on ships or on goods on shipboard, or for effecting it in such a manner that the insured is not protected; and a variety of other actions of a seafaring nature, to the decision of which a knowledge of maritime law and practice is required; see 1681, c. 16, (*supra*). Ersk. i. 3. 33; Boyd, 5, &c.; Smith, 19; *Gavin and Son, supra*. In the following cases, discussions took place as to whether they were to be deemed maritime or not; *Walker, &c. v. Campbell*, 15 June 1803, M. 7537; *Forbes v. Gordon*, 8 Dec. 1812, F. C.; *Campbell v. Mackie*, 4 Mar. 1823, ii. S. 267, (N. E. 237); *Campbell v. Little*, 13 Nov. 1823, ii. S. 484, (N. E. 429); *Henderson v. Admiralty Clerks*, 30 June 1827, v. S. 886, (N. E. 822); *M'Kinnon v. M'Leod*, 9 July 1828, vi. S. 1108; *Mackenzie and Mandy v. Campbell*, 11 July 1829, vii. S. 899. Several of the actions above enumerated are appropriated for trial by jury, *supra*, p. 361.

By § 40 of the statute 1 Wm. IV. c. 69, (*supra*), it was enacted that summonses in maritime and consistorial causes instituted in the Court of Session, should be signed by one of the principal or depute clerks of Session, and it should not be necessary that any such summons should pass the signet, or require any concurrence for the public interest. Where the summons had been signeted, and not signed as here ordered, the whole proceedings were set aside; *Gavin and Son, supra*. By § 29 of the act 1 and 2 Vict. c. 118, (16 Aug. 1838), it is declared "that summonses in Admiralty causes may be

raised, and pass under the signet, in like manner as other summonses before the Court of Session now do." In the Admiralty Court it was usual to execute summonses blank, except in the names of the parties; but this has not been practised in the Court of Session, and they now contain a warrant of arrestment, which was also the practice in the Admiralty Court. The ordinary forms of procedure in the Court of Session apply to admiralty causes, *Taylor v. Williamson*, &c. 13 Jan. 1831, ix. S. 265; *Cobb and Mitchell v. St. Patrick Assurance Co.*, 11 July 1833, xi. S. 993; see *infra*, sect. vii.

#### SECT. II.—CAUTION DE JUDICIO SISTI.

Where the debtor in a maritime claim is in *meditatione fugæ*, the creditor has the ordinary remedy of apprehending his person; see *infra*, P. iii. 13. 9. But in all maritime actions in the Court of Session,<sup>1</sup> he is entitled to insist, not only for caution *de judicio sisti*, but *judicatum solvi*. The application, if necessary, may be made to the Ordinary on the bills. While the interest of the creditor is thus sedulously attended to in proceedings in maritime causes, that of the defender is not neglected. For the pursuer, if required, must find caution, *de damnis et impensis*, for the defender's expenses and damages, if any be awarded against him.<sup>2</sup> In *Leitch v. Thomson*, 3 June 1834, xii. S. 677, it was

<sup>1</sup> It is now otherwise in the Sheriff-Courts,—“Be it enacted, That in maritime causes, or proceedings raised or brought before any sheriff-court in Scotland, caution *judicatum solvi* or *de damnis et impensis* shall not be required, in any such cause or proceeding, from any party who shall be domiciled in *Scotland*, any law or practice to the contrary notwithstanding, unless the judge shall require it on special grounds, to be stated in the interlocutor requiring the same, or a note annexed thereto,” 1 and 2 Vict. cap. 119, (16 Aug. 1838), § 22.

<sup>2</sup> The Lord Ordinary, &c., in respect this is a maritime cause, upon motion—Appoints the pursuers to find caution *de damnis et impensis*, and the defender at the same time to find caution *de judicio sisti et judicatum solvi*, all within ten days.”



held imperative on the Court of Session to ordain the pursuer to find caution *de damnis et impensis*, if required, though he may not have insisted for caution *judicatum solvi*, on the part of the defender. Juratory caution, on an order against a defender to find caution *de judicio sisti et judicatum solvi*, has sometimes been considered inadmissible; Brodie, 164, Note; *Chalmer v. Gore*, 8 Feb. 1751, M. 2042; Elchie's Notes, 86, but was allowed where the defender was resident in this country; *Grays, &c. v. Sutherland*, Feb. 1848, x. D. If the cautioner becomes bankrupt, new caution must be found; and this rule holds where the pursuer, having obtained decree against the defender before the sheriff, the cautioner of the pursuer died, during the discussion of a suspension in the supreme court; *Gillies v. Smith*, 19 Jan. 1832, x. S. 209; see i. Bell, Com. 384. When judgment is pronounced, care will be taken that it contains a decerniture against the cautioner.

#### SECT. III.—ACTIONS FOR SAILOR'S WAGES.

As we formerly noticed, (*supra*, p. 203), persons unconnected with each other cannot in general sue in one summons. But as the wages of mariners (under which designation is included the mate) are contracted on the credit, not only of the master and owners, but of the ship, it is held in practice, that all the mariners of a vessel may sue, in one action. By certain statutes, there must be a written agreement relative to the wages, which is known by the name of Ship's Articles. In all actions for the recovery of wages, the master and owner are bound to produce these articles. Though not produced, the seaman's claim is not barred; and even though there have been no written agreement, the action, it appears, is still good. Bell, Com. i. 509; Boyd, 20; Smith, 21; and later Merchant Seamen's Act, 7 and 8 Vict. c. 112, (5 Sep. 1844); Abbot on Shipping (Ed. 1847), 654.

## SECT. IV.—PROCESS OF SET AND SALE.

Where several persons are owners of a ship, and they cannot agree how she should be employed, or if any of the owners are desirous of selling their shares, they ought to offer them at a certain price to the other owners, and if the parties cannot agree, it is competent for any owner to raise a summons of Set and Sale against the other proprietors. The conclusions of this action are, either that the defenders should take the pursuer's shares at a certain price, or that they should sell theirs to him at the same price; or otherwise, that the ship should be sold, and the price divided among the owners. If, when the cause comes into court, either of the parties agrees to take the shares of the others at the price put upon them, an interlocutor is pronounced, decerning, adjudging, and declaring accordingly,<sup>1</sup> but if neither of the parties will agree to take the shares of the other, there is no alternative but to ordain the vessel to be sold, and the price divided among the owners; *Boyd*, 26; *Smith*, 48. A summons, without the alternative offer to take the defender's shares, was held incompetent, though the pursuer was a minor, *Johnstone v. Borrie*, Feb. 1846, Lord Robertson, outer-house, (not reported).

## SECT. V.—OF ARRESTMENT AND SALE.

When a vessel has been arrested, the mode of rendering it available as a source of payment, is not by an action of

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<sup>1</sup> " Having heard parties, &c. finds it instructed that the defenders A. and B. have accepted of the pursuers' sixty-fourth parts of the ship at the rate of £ , the price set thereon by the pursuer C.,—therefore adjudges, decerns and declares the said sixty-fourth parts of the ship libelled, the with her whole furniture, apparelling, and float-boat, pertaining to the said C. pursuer, to appertain and belong to the said A. and B., and ordains possession thereof to be given to them,—and decerns."

forthcoming, as in the case of other arrested goods, but by a process of sale. This action sets forth the grounds of debt, which will in general be a liquid obligation or decree, the arrestment which has been used, and concludes that the ship should be sold, and the proceeds made forthcoming to the complainer, or at least as much thereof as will pay his debt. When the action is called in court, and no opposition made, a minute is lodged, craving the Lord Ordinary to name a proper person to make, upon oath, an inventory of the ship, and to ordain him to give his opinion at what price the ship should be set up for sale, and also to grant commission to any justice of the peace to take his oath. The inventory being prepared, and affidavit taken and reported, another minute is lodged craving the Lord Ordinary to grant warrant to expose the vessel to sale at the appraised value, after due advertisement, and the price to be consigned in the hands of the clerk of Court. Articles of roup are accordingly prepared by the clerk, who also officiates as clerk at the sale. The vessel being sold and the price consigned, a third minute is lodged, narrating the proceedings and craving decree of sale in favour of the purchaser, and the bond of caution for the price delivered up; and the minute may also crave that the proceeds, or as much of them as are necessary, may be paid over to the pursuer in satisfaction of his debt. Where the debt has not been constituted, conclusions for constituting the debt will also be inserted in the summons, which will then be a summons of constitution and sale. When decree of constitution is pronounced, the procedure is the same as in the case already mentioned of a simple action of sale; *Taylor v. Williamson, &c.*, 13 Jan. 1831, ix. S. 265; *Boyd*, 29; *Smith*, 60, &c.

Where there are several competitors for the price, they will be ordered to lodge their grounds of debt and diligences with their claims, in the form of condescendences, and a

competition will take place as in a multiplepointing. When the case has been fully pleaded, an interlocutor of ranking and preference will be pronounced, and warrant granted to the clerk to pay the competitors as ranked.<sup>1</sup> The creditor of a part-owner of a vessel may use arrestment of the vessel till security to the extent of the debt, or of the debtor's interest, is granted by the other owners; *M'Aulay v. Gault*, 6 Mar. 1821, F. C. Where a vessel is not in a safe harbour, it is illegal to dismantle it of its sails, &c., and if any damage ensues, the party so interfering with the ship will be responsible; *Kennedy v. M'Kinnon and M'Leod*, 13 Dec. 1821, i. S. 210, (N. E. 198). If it is wished to dismantle the vessel, a petition should be presented for authority to bring her into harbour for this purpose.

#### SECT. VI.—JURISDICTION IN PRIZES ABOLISHED.

The Court of Admiralty at one time exercised jurisdiction in questions of prizes and the condemnation of vessels; but this was taken away, and such jurisdiction vested solely in the High Court of Admiralty of England, by 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 57.

#### SECT. VII.—CONCLUSION.

In conclusion, we may notice the other provisions relative to the admiralty jurisdiction of the Court of Session, contained in the 1 Wm. IV. c. 69, (*supra*). By § 23, it is enacted, "That the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in the foresaid

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<sup>1</sup> Forms of the minutes, interlocutors, &c. used in the Admiralty Court, and which are adopted, *mutatis mutandis*, in the Court of Session, will be found at length; Boyd, 31, &c. The whole substance of these is given in the text.

courts respectively." This clause has always been dealt with as imperative, *Grays, &c. v. Sutherland*, 26 Nov. 1847, x. D. 154; *supra*, Sect. ii.

By § 21, "All applications of a summary nature may be made to the Lord Ordinary on the Bills."

By § 29, "Inferior admiralty jurisdictions, not dependent upon the High Court of Admiralty, shall continue as heretofore, but the judgments of such courts shall be subject to review solely in the Courts of Session and Justiciary respectively."

By § 40, "For conducting causes in the Court of Session, no agent shall be entitled to a higher rate of charge for any part of such duty, than such as would have been legally exigible for the same duty in the High Court of Admiralty, or in the court of the Commissaries of Edinburgh respectively, before the passing of this act; and no fee or demand on account of the fee fund of the Court of Session, or on account of any clerk or officer in that court, shall be due or exigible in any such cause." See also note at end of schedule of fees, appended to 1 and 2 Vict. c. 118, (16 Aug. 1838).

By § 28, Admiralty procurators are allowed, during their respective lives, to conduct, "as agents before the Court of Session, all or any causes and proceedings whatsoever, which are or may be competently heard and determined in that court;" *supra*, p. 99.

## B.—CONSISTORIAL CAUSES.

### SECT. I.—REGULATIONS OF 11 GEO. IV. AND 1 GUL. IV.

The jurisdiction of the Commissaries of Edinburgh<sup>1</sup> was

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<sup>1</sup> For the history of the Consistorial judicatories established after the Reformation, see Stair, iv. 1. 36; Ersk. i. 5. 25; Boyd, 65; Fergusson, Introd. xv. 89; Lothian, 13, *et seq.*; Riddell, i. 426, &c.; Fraser, i. 12,

much restricted by the statutes 4 Geo. IV. c. 97, (19 July 1823), and 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), and was finally abolished by 6 and 7 Wm. IV. c. 41, (28 July 1836), § 1. By § 33 of the 11 Geo. IV. and 1 Wm. IV., it is enacted, "that all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro*, shall be competent to be brought and insisted on only before the Court of Session." Summonses in consistorial cases do not pass the signet. They are not signed by a writer to the signet, but by a principal or depute-clerk of Session, and require no concurrence for the public interest, (*supra*, pp. 16, 200).

§ 36 declares "The Lord Ordinary shall, in all actions of divorce, administer the usual oath of calumny<sup>1</sup> to the pursuer." The commissaries were in use to administer this oath in cases of declarator of nullity of marriage, and in actions of separation between spouses. But, whether intended or not, the above clause confines the oath of calumny to actions of divorce. Where the pursuer is out of the country, or where there is any proper excuse for his absence, commis-

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*et seq.* The Commissary Court of Edinburgh had a double jurisdiction, one diocesan within the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire; the other universal, by which it reviewed the sentences of inferior commissaries, who were placed in most of the principal towns, and exercised a privative jurisdiction in declarators of marriage, actions of divorce, &c., and a cumulative jurisdiction in actions of slander and defamation, &c. The result of the later statutory arrangements, referred to in the text, is, that each Sheriff is Commissary within his own territory, that his proceedings are reviewable by the Court of Session in the usual way, the latter court having a privative jurisdiction, in the more important consistorial causes.

<sup>1</sup> See the form of the oath of calumny in a divorce on the head of adultery, *infra*, Sect. iii.

sion will be granted for taking the oath ; *Fergusson's Decis.* 255, 266, 268 ; *A. B. v. C. D.*, 16 June 1838, xvi. S. 1143 ; *Potts, Pet.*, 17 Dec. 1839, ii. D. 248 ; *Orde or Murray v. Murray*, 20 Feb. 1846, viii. D. 535. When the summons is called and enrolled, decree is not given, as in other cases, as a matter of course, where the defender fails to appear. The pursuer's case must be substantiated by proper proof. " No decree or judgment in favour of the pursuer shall be pronounced in any of the consistorial actions herein before enumerated, whether appearance shall or shall not be made for the defendant, until the grounds of action shall be substantiated by sufficient evidence," § 36. The same course must be followed, though the defender appear and make admissions which would be sufficient, in ordinary cases, to entitle the pursuer to decree ; *Muirhead v. Muirhead*, 28 May 1846, viii. D. 786.

§ 37. " Such causes shall not be appropriated to trial by jury ; but it shall be competent to either division of the Court of Session, or to a Lord Ordinary, after advising with the division of the Court to which he belongs, to direct that any such cause, or any issue or issues of fact connected therewith, be tried by jury." But this mode of procedure has been but little if at all used. This section farther provides, " that in the swearing of witnesses in consistorial causes the same oath shall be administered as is in use, in the other courts of justice in Scotland."<sup>1</sup>

§ 38 enacted, " When a proof in any such cause shall be directed to be taken by commission, the remit to take such proof shall be made to the Commissary Court at Edinburgh, which court, or any judge thereof, shall take such proof accordingly."

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<sup>1</sup> The very solemn oath used in the Commissary Court will be found in *Boyd*, 87.

It was held, under this enactment, that the commissaries had no power to delegate their authority to take a proof; *Malcolm v. Smith*, 15 Feb. 1831, ix. S. 442; although they formerly might grant a commission to take a proof; *Adair v. Adair, &c.*, 3 Mar. 1827, v. S. 519, (N. E. 488); and they had often granted such commissions where the parties were so poor as to be unable to pay the expense of bringing witnesses to Edinburgh,—where the witnesses were out of the kingdom, or at a great distance, &c.; *Lothian*, 20, and 253.

The section of the statute 11 Geo. IV. and 1 Wm. IV. above quoted, as regulating the mode of taking proofs in consistorial cases, is now superseded by § 2 of 6 and 7 Wm. IV. c. 41, (28 July 1836). It is there declared, that “when it shall be necessary to take proofs in consistorial causes, such proofs shall be taken by the sheriffs to be appointed for that purpose, in the manner directed by the said former statute,” *i. e.* 4 Geo. IV. c. 97, *supra*. It had declared, (§ 4), that “it shall be lawful for his Majesty’s principal Secretary of State for the home department, to appoint, from time to time, such number of persons, being sheriffs-depute of counties, as he shall think fit, to take proofs in consistorial cases; which duty the persons so appointed shall perform, and the said persons shall not receive any remuneration, on account of such duty from any party in any such cause.” A list of witnesses must be furnished to the agent for the opposite party a reasonable time (generally two or three days) before the diet of proof; *Hutcheson v. Hutcheson or Richardson*, 29 May 1834, xii. S. 643.

In cases where the parties, from poverty, are unable to procure the attendance of the witnesses in Edinburgh, a recommendation will be given in the interlocutor allowing the proof, to the sheriffs commissaries to make an order for taking the proof, at some more convenient place; *Thomson v. Bullock or Thomson*, 9 Dec. 1836, xv. S. 235, (as corrected



in errata at end of vol.) ; but the proof must be taken before a sheriff commissary, *Browne v. Burns*, 18 June 1842, iv. D. 1425, overruling *A. B. v. C. D.*, 7 Feb. 1839, i. D. 466.

As to judicial examinations in consistorial cases, see *supra*, p. 404.

Reductions of judgments in consistorial actions must be brought within year and day. Instructions to Commissaries in 1563, Balf., 659, § 20, ratified in Parliament in 1592, *ibid.* 676, (Th. Ed. iii. 574), "The partie that micht have occasioun to raise summondis of reductioun or appellatioun, being of perfeit age, and not out of the realme, *ex causa necessaria et probabili* ;" *Donald v. Thom*, 16 May 1823, F. C., and ii. S. 312, (N. E. 275) ; and *Gardiner v. M'Arthur*, there referred to ; *ibid.* note ; *Menzies, &c. v. Menzies, &c.*, 21 Nov. 1835, xiv. S. 47 ; *Balfour v. Robertson*, 2 Feb. 1839, i. D. 458 ; *Fraser*, i. 705.

By § 40 of the 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), it is provided that for conducting Admiralty and Consistorial cases in the Court of Session, "no agent shall be entitled to a higher rate of charge for any part of such duty, than such as would have been legally exigible for the same duty in the High Court of Admiralty, or in the court of the Commissaries of Edinburgh respectively, before the passing of this act ; and no fee or demand on account of the fee fund of the Court of Session, or on account of any clerk or officer of that court, shall be due or exigible, in any such case." See *supra*, p. 420.

The general rules of procedure as to making up a record, sisting mandatories, &c., are the same in consistorial actions as in ordinary cases ; *Warrender v. Warrender*, 5 July 1834, xii. S. 885 ; *Taafe and Mandy. v. Taafe and Moffat*, 22 Feb. 1822, i. S. 341, (N. E. 319) ; *Craigie v. Hoggan*, 13 May 1837, xv. S. 924.

SECT. II.—ACTIONS OF SEPARATION AND ALIMENT.<sup>1</sup>

Actions for separation and aliment, at the instance of married women against their husbands, are common in consistorial practice.<sup>2</sup>

One of the chief duties of a married pair being adherence, our law does not sanction any action for aliment at the instance of a married woman against her husband, where he is willing to entertain her in his own house, and where he has not forfeited his right to do so by maltreatment; *Countess of Caithness v. the Earl*, 25 July 1744, M. 5886. A voluntary contract of separation was even held, by our older practice, null and void; *Drummond v. Rollock*, 11 Feb. 1624, M. 6152; i. Sup. 349. But it was afterwards held to be merely revocable, at the instance of either party, and that neither could come under an effectual obligation not to recal it, though it will continue effectual for all arrears; *Livingstone v. Begg*, 6 Feb. 1666, M. 6153. After the revocation, however, though during the dependence of an action for adherence, no action founded on the contract for aliment after the date of the revocation can be sustained; *Lawson v. Bain or Lawson*, 15

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<sup>1</sup> In actions generally by a wife against her husband, a *curator ad litem* to the pursuer should be appointed *in initio litis*, but this is not always attended to. The appointment is made in such a form as this,—“A. (counsel’s surname) represented to the Lord Ordinary that the pursuer being a married woman insisting against her husband, it would be necessary to appoint a curator to take charge of her interest in this process, and suggested L. M. as a fit person for the office:

“The Lord Ordinary having heard what is above stated, nominates and appoints the said L. M. to be curator to the pursuer *ad hanc litem*; and the said L. M. being present at the bar, accepted of the said office, and gave his oath *de fidei administratione* accordingly.

“Thereafter, the Lord Ordinary allows the curator to see the process for eight days.”

The same form, *mutatis mutandis*, is used for the appointment of curators to pupils and minors. *Supra*, pp. 140, 147.

<sup>2</sup> See style of summons, Boyd, 114; Lothian, 202; Fraser, Apx. 640.

obtain letters of lawburrows against her; *Thomson, Petr.*, 7 Mar. 1815, F. C.; *Fraser*, i. 467.

Where a wife is willing to reside in family with her husband, but he refuses, and insists on her living separate from him, the action of aliment will usually be combined with conclusions for adherence; but if he allow her a sufficient aliment, it has been found that she has no right to insist that she shall live in the same house with her husband, and the court refused to interfere to keep her in possession. Her only remedy in such a case is to raise an action of adherence against her husband, which will, on the elapse of the proper period, found an action of divorce, and in the meantime the husband must aliment her, and furnish money to carry on the proceedings against himself; *Colquhoun v. Colquhoun*, 7 Mar. 1804, M. *Husb. and Wife*, Apx. No. 5.

Whether a woman, separated from her husband, can compete with his onerous creditors for her aliment, will depend upon the actual situation of parties. In the ordinary case, a woman cannot compete with the creditors of her bankrupt husband, even to the effect of retaining a share of the rents of her own estate, when abandoned by her husband, *Robb v. Trustee for Husband's Crers.*, 8 Mar. 1794, M. 5900, and Bell's Fol. Cases, 13. A voluntary separation makes no difference, unless she have obtained a security over his estate during his solvency, *Macgregor's Tr. v. Macgregor*, 22 Jan. 1820, F. C.; but where there has been a proper judicial separation, as the wife can raise diligence against her husband upon the decree, the claim will be sustained, even in a competition with onerous creditors, *McDonald and Elder v. McLeod*, 15 Jan. 1811, F. C.; *Lockhart or Thomson v. Sharp*, 13 Nov. 1828, vii. S. 1; *Wyllie v. Smith, &c.*, 15 Nov. 1834, xiii. S. 40.

With regard to the amount of aliment that can be demanded, the wife must be maintained in necessaries suitable to the husband's means, and if he have not given her what is proper, action will be sustained against him, at the instance

of the tradesmen who have made furnishings to her, even although he may have executed an inhibition against her, *Auchinleck v. Earl of Monteith*, 23 June 1675, M. 5879; *Campbell v. Laird of Elden*, 25 July 1676, M. *ibid.* A man with £200 per annum, and without other property, was found liable to his wife in £50 per annum, without any allowance for furniture, *Elder v. M'Lean or Elder*, 5 Feb. 1831, ix. S. 393. Aliment of £30 was awarded to a wife, with the furniture of a room and a kitchen, (or £5 per annum in lieu thereof), where the husband's sole income was £100 a year, as master of a trading vessel, *Mackellar v. Mackellar*, 16 June 1838, xvi. S. 1149. Where the husband had turned his wife out of doors, and raised an action of divorce against her, on the head of adultery, the Court allowed her aliment at the rate of one shilling a day, the husband having a salary of £78 per annum, *Gray or Croall v. Croall*, 7 Dec. 1832, xi. S. 185. See also *Graham v. Graham*, 15 Dec. 1827, vi. S. 254; *Derby or Syme v. Syme*, 24 Jan. 1833, xi. S. 305.

A wife is entitled to interim aliment and expenses, during the prosecution of an action of divorce for adultery, at the instance of her husband, for she has the presumption of innocence in her favour. She is entitled to get decree for these, though her husband alleges he is in destitute circumstances, and is applying for the benefit of the Poor's Roll, *Baxter v. Baxter*, 28 May 1845, vii. D. 639. She has even been found entitled to aliment after the Commissaries had pronounced decree against her, which had been extracted, during the dependence of an action of reduction in the supreme court, *De la Motte v. Jardine*, 9 Feb. 1789, M. 447. This decision was carried only by the casting vote of the President; Hailes 1060. It was confirmed in *Allsopp v. Allsopp*, 8 July 1839, viii. S. 1032. Whether the wife be successful or not, the husband must pay the whole of her expenses, and, on taxation, these will be allowed so far as necessarily and properly incurred in defend-

ing the action, according to the circumstances of the case, *King v. Patrick*, 26 Feb. 1845, vii. D. 536. He is equally liable where he allows her an ample separate allowance, *Harman v. Macalister's Trs.*, 6 July 1826, iv. S. 799, (N. E. 806). After an adverse decision in the Court of Session, the wife cannot insist on the husband paying her the expenses of an appeal to the House of Lords, *King v. King*, 11 Mar. 1843, xv. S. Jur. 393; and in *Cunningham Fairlie v. Cunningham Fairlie*, 4 Feb. 1813, F. C., it was held, that where the husband had appealed the case to the House of Lords, the wife ought then to have applied to the Commissary Court for money to enable her to carry on her defence. On the point, whether the husband can go on with the case, without first paying the sum awarded against him; see *Dixon v. Bayne or Dixon*, 17 Feb. 1841, iii. D. 559.

In actions of separation and of divorce at the wife's instance, it would be pernicious to lay down a general rule, that, on the mere raising of the action, she is entitled to a separate aliment, as this might be an encouragement to the instituting of such suits, on frivolous grounds; the matter is one of discretion with the Court, according to the peculiar circumstances of each case, *Maxwell v. Wallace*, 5 Mar. 1808, F. C.; *Cramond v. Allan*, 25 June 1756, M. 5886; *Lessly, &c. v. Nairn*, 27 Feb. 1711, iv. Sup. 880; *Lothian*, 127; *Tyre v. Ormiston*, 13 Nov. 1817, Hume, 7; *Menzies v. Menzies*, 26 May 1832, x. S. 581; *Currie v. Currie*, 6 Dec. 1833, xii. S. 171. Where the pursuer succeeds in her case, her agent will be entitled to payment of his account from the husband, as if he had employed him, and it will be so taxed, *M'Alister v. Her Husband*, 18 Nov. 1762, M. 4036; *Taylor v. Bennie*, 17 Nov. 1831; *Lothian*, 89. Where a wife, pursuing such an action of separation, had funds of her own in a bank sufficient for her maintenance, her husband was found not liable in aliment, *pendente processu*, *Currie or M'Farlane v. M'Farlane*, 24 June 1844, S. Jur. xvi. 521. A stricter rule

is followed in actions of declarator of marriage. It would evidently be intolerable if any woman, merely by raising a declarator of marriage, could force her alleged husband to support her, until the issue of the action ; and it is therefore settled, that she is not entitled to aliment, or to a sum for law expenses, until she bring the strongest evidence to satisfy the Court that her marriage will, in all probability, be established, *Campbell v. Sassen and Mackenzie*, 23 May 1826, ii. W. and S. 309 ; *Munro v. Munro*, 11 Mar. 1841, xvi. F. 884 ; *Browne v. Burns*, 30 June 1843, v. D. 1288.

Where a husband has inhibited his wife, he is not liable for furnishings to her, if he have alimented her sufficiently ; and if she live separately from him, there is still less ground for making him liable, as she is not then *præposita rebus domesticis*, *Gordon v. Sempill*, 13 Dec. 1776, M. 446 ; Ersk. i. 6. 26. See *Buie v. Gordon*, 23 Feb. 1827, v. S. 465, (N. E. 437), and an agent, conducting law-suits for a wife living separately from her husband, is not entitled to payment of the expenses incurred in actions against the husband, if unsuccessful, or in actions with third parties, whether successful or not ; *Young v. Cooper*, 9 June 1825, iv. S. 81, (N. E. 83), *supra*. See *Harman v. Macalister's Trs.*, 6 July 1826, iv. S. 799, (N. E. 806), *supra*. When decree of aliment is obtained, diligence may be raised against the husband, on which he may be imprisoned ; *MacLachlan v. Campbell*, 25 May 1809, F. C. ; *Reid v. Laing Reid*, 10 July 1823, ii. S. 468, (N. E. 418) ; *Hamilton v. Wylie*, 28 Feb. 1828, vi. S. 640. When a separation takes place, the wife, where no blame attaches to her, is entitled, in the general case, to keep the sons till they are seven, and the daughters till twelve ; but the Court, in each particular case, will provide for the custody of the children, in the manner which appears most expedient ; Fraser, i. 466, and authorities there cited. See *supra*, P. i. 2. 18, p. 45 ; *Dallas or Borthwick v. Dundas*, &c. 20 Dec. 1845, viii. D. 318, and the late case, *A. B. v. C. D.*, 10 Dec. 1847, x. D. 229.

In actions of separation and aliment when the pursuer has made out her case, decree of separation *a mensa et toro* and for aliment, will be pronounced ; A. S. 20 Dec. 1823.<sup>1</sup>

SECT. III.—ACTION OF DIVORCE FOR ADULTERY.<sup>2</sup>

When this action is raised against a party who is furth of Scotland, an edictal citation is held sufficient, where the party's residence is not known and cannot be discovered ; *Buchanan or Downie v. Downie*, 18 Nov. 1837, xvi. S. 82 ; in other cases, personal notice, (which is usually given by notarial intimation),<sup>3</sup> is required ; *Blake v. Blake*, 6 July 1826, iv. S. 795, (N. E. 803) ; *Warrender v. Warrender*, 28 June 1834, xii. S. 847 ; 27 Aug. 1835, ii. S. and M'L. 154 ; See *Campbell v. Campbell*, 24 Feb. 1832, x. S. 373 ; *Turnbull or Purves v. Purves*, 18 July 1840, ii. D. 1468, and xv. F. 1569.

The summons<sup>4</sup> must set forth the facts of the alledged acts

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<sup>1</sup> " The Lord Ordinary, &c. finds it proved that the said C. D., defender, has been guilty of grossly abusing and maltreating the said A. B., pursuer, his wife : Therefore finds the said A. B. has full liberty and freedom to live separate from the said C. D. her husband ; ordains him, the said C. D., to separate himself from the said A. B., pursuer, *a mensa et toro* in all time coming : ordains the said C. D. defender to make payment to the said A. B. pursuer of the sum of £            yearly for aliment to her, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of said aliment at Whitsunday for the half-year immediately following, and so forth half-yearly thereafter during their joint lives : *Item*, Of the lawful interest on each half-year's aliment from the term of payment until paid, and decerns."

<sup>2</sup> The many important questions of international law which have occurred with respect to the jurisdiction of the Courts of this country, in actions of divorce, will be found discussed ; Ersk. i. 2. 20, and Ivory's Notes ; Ferguson, Decis. 15 ; *et seq.* ; Fraser, ii. 742.

<sup>3</sup> See the form of notarial intimation ; Lothian, 143.

<sup>4</sup> See forms, Boyd, 99 ; Lothian, 118 ; Fraser, Apx. 641, &c.

of adultery, as to time, place, names, and circumstances, with all the precision in the pursuer's power; *Nicolson v. Nicolson*, 21 Feb. 1770, M. 12369; *Steele v. Steele*, 10 July 1835, xiii. S. 1096; *Smith v. Smith*, 13 Feb. 1838. The defence frequently consists in a simple denial of the libel.

When the summons appears in the Weekly (Printed) Roll, the pursuer will be ordered to attend before the Lord Ordinary to emit the oath of calumny.<sup>1</sup> See *supra*, p. 385. The

**FIRST INTERLOCUTOR.**

1 "The Lord Ordinary appoints the pursuer to appear to-day, at \_\_\_\_\_, in presence of the Lord Ordinary, to give her oath *de calumnie*; and continues the cause till to-morrow."

*(Oath of Calumny.)*

“ At Edinburgh, the                      day of                      In presence of the  
Honourable Lord                      Compeared the pursuer,  
                    who being solemnly sworn and examined, *de calumnia*, de-  
pones, That she has just cause to insist in the present action of divorce  
against the defender,                      her husband, because she believes  
he has been guilty of adultery, and that the facts stated in her libel, which  
has been read over to her, are true. Depones, That there has been no  
concert or collusion between her and the said defender in raising this  
action, in order to obtain a divorce against him ; nor does she know,  
believe, or suspect, that there has been any concert or agreement between  
any other person on her behalf, and the defender, or any other person on  
his behalf, with the view or for the purpose of obtaining such divorce.  
All which is truth, as the deponent shall answer to God.”

**Signed by the pursuer and the Lord Ordinary.**

**SECOND INTERLOCUTOR.**

" The Lord Ordinary, in respect the parties declare they are willing to hold the summons and defences as the record, makes avizandum with the process, preparatory to the record being closed."

*(Minute.)*

" The parties agree to hold the summons and defences as containing their full and final statements of fact, and pleas in law, and that the record may be closed accordingly."

(Signed) P. R.  
J. M.



ordinary course of procedure will be gathered from the interlocutors given below. If either party decline closing the record on summons and defences, a record must be made up by condescendence and answers. *Warrender v. Warrender*, 5 July 1834, xii. S. 885; ii. S. and M'L. 154. If the pursuer's proof is sufficient, the Lord Ordinary will grant decree of divorce in terms of A. S., 20 Dec. 1823.<sup>1</sup>

In actions of divorce for adultery, it is a very usual defence to plead condonation or *remissio injuriæ*, generally evidenced by cohabitation subsequent to the knowledge of the acts of adultery by the pursuer. A distinction is acknowledged between the acts of remission by a wife and by a husband. The law makes allowance for the position in which the former is placed, and circumstances, where she is pursuer, may

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#### THIRD INTERLOCUTOR.

"The Lord Ordinary, in respect of the minute of the parties, of this date, holds the record as closed: Finds the libel relevant, allows the pursuer a proof of the facts averred by her therein, and to the defender a conjunct probation thereanent: Grants diligence at the instance of both or either of the parties against witnesses and havers; and remits to the Sheriffs Commissaries to examine the witnesses and havers, and conduct the said proof, to be reported within \_\_\_\_\_ days, and dispenses with the reading of the minute book."

#### FOURTH INTERLOCUTOR.

<sup>1</sup> "The Lord Ordinary having considered the summons, with the proof adduced, productions, and whole process, Finds facts, circumstances, and qualifications proved relevant to infer the defender C. D.'s guilt of adultery with \_\_\_\_\_ and \_\_\_\_\_, mentioned in the libel and proof: Finds him guilty of adultery accordingly, and therefore divorces and separates the said C. D. defender from the said A. B. pursuer, her society, fellowship, and company, in all time coming: Finds and declares that the said C. D. defender, has forfeited all the rights and privileges of a lawful husband, and that the said A. B. pursuer, is entitled to live single or marry any free man, as if she had never been married to the said C. D. defender, or as if he were naturally dead: Finds the defender liable in expenses to the pursuer, and decerns," &c.

not be allowed to bar the remedy of divorce, which would assuredly destroy such a suit by a husband, when substantiated against him; *Greenhill v. Ford*, 7 Feb. 1822, i. S. 296, (N. E. 275); Aff. 16 June 1824, ii. S. App. 435, (which see). The only other defences which can be stated against this action, where the adultery is admitted or proved, are *lenocinium* (connivance) or acquiescence on the part of the pursuer. Recrimination is no bar to divorce on the head of adultery, however it may affect patrimonial consequences; *Lockhart v. Henderson*, 7 Dec. 1799, M. Apx. *Adultery*, No. 1; *Warrender v. Warrender*, 7 July 1836, xiv. S. 1099. When the defence of *remissio* is pleaded, a conjunct proof will be at the same time allowed to each party—to the pursuer of the adultery, and to the defender of the *remissio*; *Taylor v. Binnie or Taylor*, 22 June 1832, x. S. 680. The defence of *remissio* may be pleaded by creditors; *Greenhill v. Ford*, *supra*; Lothian, 158. See *supra*, sects. i. ii.

#### SECT. IV.—ACTION OF DIVORCE FOR WILFUL DESERTION.

The only other ground for an action of divorce, known in our law, is wilful desertion. The desertion must have continued for four years to found the divorce, 1573, c. 55, (c. 1, Th. Ed. iii. 82); but certain preliminary steps are necessary before raising an action of divorce, which may be proceeded with, after a desertion of one year.

After a desertion for this latter period, an action of adherence may be raised, either before a sheriff as an inferior commissary, or before the Court of Session. The jurisdiction of the Court of Session in actions of adherence, has been doubted, as these are not included in the list of cases, in which this jurisdiction is expressly declared competent by the statute, 11 Geo. IV. and 1 Wm. IV. c. 69, (*supra*, p. 421). The point is at present in dependence in the First Division, on written pleadings. The result will be stated in the Addenda at the end of the work. See what is said on this subject *supra*, p. 15.

The summons of adherence sets forth the marriage and the time, place, and manner of the desertion.<sup>1</sup> It concludes, that the parties should be declared married persons; that the defender should be decerned to adhere; and a conclusion for aliment and expenses may also be inserted. Although this is not one of the actions in which the statute declares (*supra*, p. 422) that a proof shall be led, even although the defender does not appear; evidence, however, is always adduced; Lothian, 98; *Black or Anderson*, 4 Feb. 1842, iv. D. 615. Decree of adherence being obtained, in which it will be proper to state the date of desertion, though this is sometimes omitted,<sup>2</sup> a horning is raised, on which the defender is charged and denounced, and the horning and executions recorded.

A petition is then presented to the presbytery, within whose bounds the defender resides, or last resided, praying that Court to admonish the defender to adhere, or to

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<sup>1</sup> See Styles, Boyd, 105; Lothian, 102, *et seq.*; Fraser, Apx. 645.

<sup>2</sup> "The Lord Ordinary, &c.—finds facts, circumstances, and qualifications proved relevant to infer marriage betwixt the said A. B., pursuer, and the said C. D., defender: Finds that the said defender deserted the pursuer upwards of                      years ago, and has not resided with or adhered to her since that time: Ordains the said C. D., defender, to adhere to the said A. B., pursuer, as his lawful wife, her society, fellowship, and company, and to treat, cherish, and entertain her at bed and board, and to perform the other conjugal duties, as becometh a husband to his wife, and to cohabit with the said A. B., pursuer, and nowise leave or desert her company, in time coming, and decerns." Or if *absolvitor*:—

"The Lord Ordinary, &c.—finds that the said A. B., pursuer, has failed to instruct her libel; therefore assolizies *simpliciter* the said C. D. defender, from the conclusions of this action for adherence: Finds the said pursuer liable in the expenses of process, and decerns.

In the schedule of the A. S. 25 Feb. 1824, the date of desertion is not mentioned in the form of extract of a decree of adherence, and it is occasionally omitted in the decree.

pronounce sentence of excommunication against him. The presbytery generally decline interfering, whereupon a protest, under the hand of a notary, is taken, setting forth the *res gesta*, and protesting that the declinature of the presbytery shall not militate against the petitioner, nor prevent her proceeding to obtain a divorce.<sup>1</sup>

All these steps being gone through, and four years being elapsed from the commencement of the desertion, an action of divorce may be raised. The summons narrates the whole of the previous proceedings, and concludes for divorce.<sup>2</sup> The pursuer gives her oath *de calumnia*, in common style. The marriage and desertion are proved by production of the proceedings in the adherence. "The *onus* of shewing that the desertion had ceased is thus thrown on the defender. He must instruct that he timeously offered to adhere, if he defends the case, but his offer of adherence comes too late, after the institution of the action of divorce;" Fraser, i. 715. The decree will be in terms of the interlocutor noted below.<sup>3</sup> See *supra*, sects. i. and ii.

<sup>1</sup> Styles for these proceedings will be found in Church Styles, 201-4; Lothian, 106, *et seq.*; Fraser, Apx. 647.

<sup>2</sup> See Styles, Boyd, 107; Fraser, Apx. 648.

<sup>3</sup> "The Lord Ordinary, &c.—having considered the summons of divorce, with the decree, at the instance of the pursuer against the defender—Finds it thereby instructed that the defender wilfully deserted from the pursuer, her house, and fellowship, upwards of \_\_\_\_\_ years ago; and having also considered the horning, charge, and denunciation, duly registered and libelled upon, and the requisition made by the pursuer to the presbytery of \_\_\_\_\_ to do what the law requires in such cases, with the instrument of protest taken against them for their refusal, depositions of the witnesses thereanent, and hail steps of procedure in the cause, divorces and separates the defender from the pursuer, and finds, decerns, and declares, in terms of the pursuer's libel, &c."

## SECT. V.—ACTIONS OF DECLARATOR OF MARRIAGE.

The libel should be drawn with a minute specification of the facts and circumstances alleged to constitute the marriage, and the particular mode of contracting marriage acknowledged in the law of Scotland, whether consent *de presenti*, promise *cum copula*, &c. to which the pursuer alleges that the facts amount, ought to be distinctly stated.<sup>1</sup> A conclusion for damages, on the alternative view of seduction, frequently appears in the summons, and a special detail of the facts and circumstances on which this conclusion is based, must also be given, *Stewart, &c. v. Menzies*, 27 June 1837, xv. S. 1198. (See Styles referred to in Note). Reference to the defender's oath is equally competent in this class of cases as in others; *supra* p. 389. This action is not one of those which, on reaching the Inner house, go to the Summar Roll, *Craigie v. Hoggan*, 13 May 1837, xv. S. 924. The form of decree is fixed by A. S. 20 Dec. 1823.<sup>2</sup> See *supra*, sects. i. and ii.

<sup>1</sup> See Styles, Boyd, 82; Lothian, 68, *et seq.*: Fraser, Apx. 631, &c.

<sup>2</sup> "The Lord Ordinary, &c.,—finds facts, circumstances, and qualifications proved, relevant to infer marriage betwixt the said A. B. pursuer, and the said C. D. defender; and hereby finds them married persons accordingly: ordains the said C. D. defender, to adhere to the said A. B. pursuer, as his lawful wife, her society, fellowship, and company, to treat, cherish, and entertain her, at bed and board, and to perform the other conjugal duties, as becometh a husband to his wife, and to cohabit with the said A. B., pursuer, and nowise leave or desert her company, in time coming: finds the said A. B. liable to the said C. D. in the expenses of process, and decerns," &c.;—or, if the defender is *assoilzied*:—

"The Lord Ordinary, &c.,—finds that the said A. B. pursuer, has failed to instruct facts, circumstances, and qualifications, relevant to infer marriage betwixt her and the said C. D. defender, therefore *assoilzies simpliciter* the said C. D. defender, from the whole conclusions of the action, and decerns," &c.

SECT. VI.—ACTIONS OF DECLARATOR OF NULLITY OF  
MARRIAGE.

Actions of declarator of nullity of marriage are founded on several grounds:—1. Impotency; 2. Bigamy; 3. Relationship within the forbidden degrees; 4. That the marriage has taken place between a divorced party and paramour, where the divorce had been granted in consequence of their previous intercourse, 1600, c. 20, (c. 29, Th. Ed. iv. 233); and, 5. Want of legal consent, on the ground of pupillarity, insanity, or force and fear. In a declarator of nullity on the head of impotency, the person must emit the oath of calumny, and answer all pertinent interrogatories. It is doubtful, if in the other cases, this oath is necessary, *supra*, sect. i.; Fraser, i. 701. Actions of nullity of marriage on the ground of impotency, can only be raised by the injured spouse, while those proceeding on other grounds may be insisted in by parties who can qualify an interest. *Ibid.* 58, and authorities referred to.

There is nothing peculiar in the procedure in this class of actions.<sup>1</sup> It is the same generally as that in actions of declarator of marriage, (last section). See *supra*, sects. i. and ii.

SECT. VII.—ACTION OF DECLARATOR OF FREEDOM AND  
PUTTING TO SILENCE.

The pursuer here libels that the defender has been in the practice of calumniating the pursuer, by giving out and reporting that she is married to him; that he is highly injured by such false reports, excluding him from his free choice in marriage, and concludes that he is free of any marriage with the defender, who ought to be put to perpetual silence thereanent in all time to come.<sup>2</sup> It has been said with reference to the enactments of the 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), that there is no court in which this action

<sup>1</sup> See forms of Summonses, Boyd, 94, *et seq.*; Lothian, 183, *et seq.*; Fraser, Apx. 629.

<sup>2</sup> See Styles, Boyd, 118; Lothian, 209; Fraser, Apx. 640.

can proceed, since the abolition of that of the Commissaries, Lothian, 21; *supra* p. 421. But the practice has been different, and such cases occurring since have been determined in the Court of Session, *J. H. v. Mr. R.* 17 July 1844; noticed in Fraser, i. 710. The subsistence of the marriage may be established in this action, as a defence against it, without a separate declarator, *Ibid.* See *supra*, sects. i. and ii.

## CHAPTER XII.

### OF THE PROCEDURE IN PROCESSES OF ADVOCATION AND SUSPENSION IN THE OUTER-HOUSE.

#### SECT. I.—ADVOCATIONS WHEN COMPETENT.

An Advocation is an action by which a process is sought to be removed from an inferior court to a higher, that it may be discussed by the latter, or remitted to the inferior court, with instructions how to proceed. Suspension is the form of proceeding by which a sentence condemnatory is stayed, and an opportunity afforded the applicant of having the action reheard in the supreme court. It is also used to stay the execution of diligence, until an opportunity is given of investigating the grounds on which it proceeds, or of discussing the formality of the diligence. By Suspension and Interdict, also, encroachments upon property, or other illegal proceedings, are sought to be stopped; and in this form many questions as to rights to property, offices, &c. are tried. The distinction between advocations and suspensions, as the means of reviewing the sentences of courts of law, was more marked in our older practice than it is at present. Formerly, advocation was used when interlocutory judgments of inferior courts were brought under review; and every interlocutor in a process might have been brought up for review, in this form. But it was held, that it was an incompetent mode of proceeding, where a final judgment had been pronounced, though not extract; *Lammertoun v. Hume*, 10 July 1662, M. 368; while

suspension was the remedy, where the decree was extracted. At present, however, not only is advocacy competent after decree, if before extract, *Wright and Graham*, 22 Nov. 1766, M. 375, Hailes, 161; but the use of it is very much abridged, as a remedy for the review of interlocutory sentences. Thus, the 50. Geo. III. c. 112, (20 June 1810), § 36, enacts, that advocations against interlocutory judgments shall only be allowed, on the following grounds:—"1. Of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party. 2. Of contingency. 3. Of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for a partial payment, provided that, in the cases specified under this head, leave is given by the inferior judge;" (see sect. iv. *infra*). § 37 enacts, "that bills of advocacy from such inferior judges shall not, in any case, be received against interlocutory judgments, upon grounds of iniquity or error, but only after final judgment (sect. iii. *infra*) shall have been pronounced." It was held insufficient to warrant an advocacy, as for defect of jurisdiction, that the citation had been irregular, no objection having been taken in the inferior court; and, in the same case, it was held premature to allow an advocacy, as for defect of jurisdiction, when a proof had been allowed in the inferior court, with the view of disposing of the objection, *Moffat v. Denham*, 20 June 1829, vii. S. 781. An advocacy on the ground of legal objection, with respect to the mode of proof, is incompetent, when the inferior court has, before answer, merely ordered certain documents to be produced, without deciding as to their admissibility, *Monkland Canal Co. v. Merry*, 8 Feb. 1822, i. S. 302, (N. E. 281); but an advocacy on this ground was held competent, where the inferior court refused to allow a witness to be examined as to a defence alleged not to have been previously stated; *Thomson v. Milton*, 28 May 1822, i. S. 440, (N. E. 408). Advocacy was held competent, where the sheriff unwar-



rantably restricted a party in his mode of proof, by sustaining a plea of prescription, *Ettles v. Robertson*, 15 Feb. 1833, xi. S. 397. An interlocutor in an action of filiation, finding a *semiplena probatio*, and allowing the pursuer's oath in supplement, cannot be advocated, on the ground of legal objection to the mode of proof, *Murdoch v. Munro*, 26 Nov. 1844, vii. D. 155. (See sect. iii. *infra*). A party, after a proof was allowed, and partly taken, having advocated, without leave, on the head of incompetency; the bill was refused, as there was no final judgment, *Carmichael v. Robertson*, 30 Nov. 1824, iii. S. 333, (N. E. 236). A document objected to, on the ground of informality, having been admitted and given effect to, in the inferior court, advocacy as to the mode of proof was refused, *Berry v. Haddow, Dale, &c.*, 16 Dec. 1815, F. C. Letters of advocacy, obtained on a false pretence of contingency, were recalled, *Brown or Monkhouse v. Gilfillans*, 27 Jan. 1824, ii. S. 641, (N. E. 542), Aff. 8 June 1825, i. W. and S. 318. See *Cameron, &c. v. Macdonell*, 1 Dec. 1824, iii. S. 341, (N. E. 242), and 13 June 1827, ii. W. and S. 595. An advocacy was sustained *ob contingentiam* of a declarator and multiplepinding, although no decree had been pronounced, and the process of declarator and multiplepinding was maintained to be unnecessary, *Baird v. Hosie*, 4 Dec. 1824, iii. S. 361, (N. E. 255). There is no such contingency between a process of sequestration at a landlord's instance for rent, alleged to have been applied for unwarrantably, and an action of damages raised in the supreme court, against the landlord, on account of said sequestration, as to entitle the landlord to advocate, *ob contingentiam*, *E. of Mansfield v. Aitchison*, 11 Dec. 1829, viii. S. 243. "A judge is said to commit iniquity when he repels a plea or defence, which he ought to sustain, or sustains what he ought to repel; or, in general, when he either does, or neglects to do, any thing in the exercise of his jurisdiction, contrary to law;" Ersk. iv. 2. 41. Advocacy with leave is competent, not only where an interim decree is

granted, but also where it is refused, *Scotts v. Haliburton*, 27 June 1823, ii. S. 435, (N. E. 388). See *Glass v. M'Intosh*, 13 Feb. 1824, ii. S. 710, (N. E. 592).

Not only the defender may advocate on the head of incompetency, but even the pursuer, *Procurator-Fiscal of Haddington v. Forrest, &c.*, 23 June 1741, M. 374; but see the same case, as reported, *ibid.* 7600. "It would seem that a pursuer cannot crave to advocate from a judge of his own choosing, on the head of incompetency, unless the judge is truly not only incompetent, but his jurisdiction incapable of being prorogated; for the bringing an action before any judge is, of itself, a strong prorogation of his jurisdiction; (Ersk. i. 2. 27. and 31); or that, though competent at first, yet, by any supervening reason, he has ceased to be so."—*Tait's MS.* "Advocation." Where a cause has been brought before an incompetent court, it cannot, in general, be removed into the Court of Session by advocacy, and discussed there, *Gordon, Petr.*, 6 Feb. 1802, M. 12,245. But advocacy of such an action was allowed, where an action in proper form had been raised before the Court of Session, *E. of Aberdeen and Wright v. Laird*, 7 Feb. 1822, i. S. 325, (N. E. 273). See also *E. of Wemyss, &c., v. Wardlaw*, 5 Feb. 1822, i. S. 293, (N. E. 272); it was held, however, incompetent to repeat a declarator in an advocacy of a process, relative to a right of property in an heritable subject, which had been found incompetent, *Bridges v. Elders*, 5 Mar. 1822, i. S. 373, (N. E. 351).

The question, whether an advocacy presented by one party to a suit, brings up the whole cause, to the effect of allowing the other party, without a separate and counter advocacy, to be fully heard on all his pleas, has occurred in a variety of cases, of late years. See them collected, S. Dig. 996, No. 1746, and references, adding *Mutrie and Lowe v. Haldane's Trs. and Railton*, 23 May 1844, vi. D. 1045, where the whole judges were consulted, and the case very fully discussed. Wherever a substantive review is to be

sought of matters not comprehended within the primary advocacy, a counter advocacy is required; but the same strictness would not probably be held applicable to incidental points, such as expenses of process.

SECT. II.—PROCEDURE IN ADVOCATIONS AND SUSPENSIONS UNDER STATUTE OF 1838. — COMPETENCY OF ADVOCATIONS, CONTINUED.

Before the statute of 1838, all Advocations and Suspensions originated by presenting a bill in the Bill-Chamber<sup>1</sup> to the Lord Ordinary officiating on the Bills. The bill of suspension or advocacy being passed, became the warrant of the letters of suspension or advocacy, which were signed by a writer to the signet.

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<sup>1</sup> The Bill-Chamber, although generally called a department of the Court of Session, may, perhaps, with stricter accuracy, be considered as a separate and distinct tribunal, of equal, or nearly equal antiquity; A. S. 31 July 1532; A. S. 1555; A. S. 18 May 1594, (unprinted); A. S. 28 Dec. 1594, (unprinted); 2 Dec. 1597, (unprinted). As many of the cases brought before it do not admit of delay, but require the immediate interposition of judicial authority, the Bill-Chamber is open during the whole year, there being no vacation. It is of importance in practice to remember, that the Bill-Chamber and the Court of Session are distinct Courts, the former, in the proceedings appropriated to it in the first instance, being merely introductory to the latter. In the ordinary case, all that the party gains who succeeds in getting his Note "*passed*" in the Bill-Chamber, is the opportunity of bringing the case into the Court of Session, by calling and enrolling in the usual way.

The forms of procedure in the Bill-Chamber do not fall within the scope of this work; but a general view of them may be gathered from the notices of this part of our judicial system occurring throughout the text. See particularly the present chapter, embodying the advocacy and suspension statute of 1838, introducing very sweeping changes in Bill-Chamber proceedings, and the relative A. S. 26 Dec. 1838, printed at length, with its schedules, in the Appendix.

The constitution of the Bill-Chamber in session and vacation, will be found stated, *supra*, P. i. 3. A. 8, and the regulations regarding the clerk of the bills, *supra*, P. i. 4. 4.

All advocations and suspensions, with the exception of advocations of final judgments of the inferior courts, and of brieves, still originate in the Bill-Chamber; but Letters of advocacy and suspension are abolished, and written Notes of advocacy and suspension prepared in terms of the 1 and 2 Vict. c. 86, (10 Aug. 1838), and relative A. S. 24 Dec. 1838, (*Bill-Chamber, &c.*), have come in place of the former bills and letters.

The statute enacts that final judgments of sheriffs, or other inferior judges, of which advocacy is at present competent, may be brought under review of the Court of Session, before extract, by lodging with one of the depute-clerks of session, or his assistant, a written note of advocacy, signed by an agent in the said court, having prefixed thereto the interlocutor or interlocutors complained of, together with the notes of the judge, if any, affixed thereto, and setting forth in a prayer the relief or remedy craved; and such note shall be received and marked by such depute or assistant clerk, on such caution as is by the present practice required being certified by the clerk of the inferior court to have been found, in common form; and certified notice, under the hand of the said depute or assistant clerk, of such note of advocacy having been received being transmitted to the clerk of such inferior court, all further proceedings in the original cause shall cease, and the process shall forthwith be transmitted to the Court of Session; and such note of advocacy and notice shall be intimated to the opposite party, by delivering a copy of the same to him, or his known agent, and a certificate of intimation shall be indorsed on the said note by the agent of the advocator; and within fifteen days after the date of such intimation, it shall be competent to call, and thereafter to enrol, the cause in the weekly printed roll, and the same shall proceed in like manner as at present on expedite letters of advocacy, § 1.

In cases of competition of brieves, as well as where a party claiming right to appear and oppose a service has made ap-

pearance, it shall be lawful to any party to remove the cause or proceedings to the Court of Session, by written note of advocacy as aforesaid, not only from any inferior judge, but also from the sheriff of Edinburgh, acting under special commission by authority of the Court of Session,<sup>1</sup> and such note shall be received and marked in manner and to the effect aforesaid, and be laid before a Lord Ordinary named in the note, who shall advocate the brief, and be the judge in the said service, without prejudice nevertheless to the power of the Court, on declinature, or other cause shown, to remit to any other ordinary to be judge in any service; and, thereafter, the cause shall proceed in the form, in such cases made and provided, § 2.

Advocation of such interlocutory judgments as are allowed by 50 Geo. III. (*supra*, p. 441), may be brought, by lodging in the Bill-Chamber a written note of advocacy, in manner aforesaid, with an articulate statement of the reasons of advocacy, together with a note of pleas in law annexed; and on caution being certified, as aforesaid, to have been found in the inferior court in common form, such note of advocacy shall be received and marked by the clerk in the Bill-Chamber, and be forthwith laid before the Lord Ordinary on the Bills, who shall pronounce such order or interlocutor thereon as shall be just; and where answers shall be ordered, such answers shall be in a similar form to the reasons of advocacy; and in case the Lord Ordinary shall pass such note of advocacy, the cause may, after the expiry of fifteen days from the passing of the note, be called, and thereafter enrolled in the weekly printed roll, in like manner as at present, on expedite of letters of advocacy; and if parties shall not be prepared to close the record upon the note and reasons of advocacy, it shall be competent to order them to be revised, with a view to their forming the record, or to order

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<sup>1</sup> By the Act 10 and 11 Vict. c. 47, (25 June 1847), proceedings in the service of heirs are placed on a totally new footing. See *infra*, p. 480.

a condescendence and answers, as in the case of ordinary actions, and the cause shall thereafter proceed before the Lord Ordinary and the Court of Session in common form, § 3.

Where the judgment of any inferior court pronounced *in foro*, which may at present be brought under review of the Court of Session by suspension, with the exception of any judgment pronounced in actions of removing, is intended to be brought under review in that form, it shall be competent to suspend the decree, and any diligence or proceedings following thereon, by lodging in the Bill-Chamber a written note of suspension, signed by an agent in the Court of Session, reciting the import and effect of the decree sought to be suspended, and setting forth in a prayer the relief or remedy craved; the presentment of which note, on being certified by the clerk, shall operate as an interim sist of diligence; and on such caution, as is by the present practice required, being found for implement of such decree, and also for such expenses as may be incurred in the Court of Session, such note shall be forthwith passed by the Lord Ordinary on the Bills, and certified notice of the note having been passed being transmitted to the clerk of the inferior court, the process shall be forthwith transmitted to the Court of Session; and such note and interlocutor passing the same shall be served on the opposite party by a messenger-at-arms, in common form; and it shall be competent, after the expiry of fifteen days from the date of service, to call, and thereafter to enroll the cause in the weekly printed roll, and to proceed therein in like manner as at present on expedite letters of suspension; provided always, that where a party is desirous to have such decree of any inferior court pronounced *in foro* suspended without caution, or on juratory caution, and also in suspensions of decreets of removing, there shall be annexed to such note of suspension an articulate statement of facts on which the suspension is founded, and a note of pleas in law; and such note shall be laid before the Lord Ordi-

nary on the Bills, who may pronounce such order or interlocutor as shall be just; and where answers shall be ordered, such answers shall be in a similar form to the reasons of suspension; and in case the Lord Ordinary shall pass the note, the same procedure shall take place as is herein before provided in the case of advocations of interlocutory judgments, it being always competent to reclaim to the Inner-house against the interlocutor of the Lord Ordinary passing or refusing such note; and provided also, that in all cases of suspension it shall be competent to the inferior court, or the Court of Session, to regulate all matters regarding interim possession, in like manner as is by the present law and practice competent in the case of advocations, § 4.<sup>1</sup>

All suspensions and interdicts, and advocations and suspensions, not otherwise provided for in the act, may be brought by lodging in the Bill-Chamber a note, in manner aforesaid, and there shall be annexed to such note an articulate statement of the facts on which such avocation or suspension is founded, together with a note of pleas in law, and such note of avocation or suspension shall be received and marked by the clerk in the Bill-Chamber, and be forthwith laid before the Lord Ordinary on the Bills, who shall pronounce such order or interlocutor thereon as may be just, and such note and order or interlocutor thereon shall be served on the opposite party by a messenger-at-arms in common form, and shall be answered in a similar form to the reasons of avocation or suspension; and in case the Lord Ordinary shall pass the said note, the same procedure shall take place as is herein before provided in the case of advocations of interlocutory judgments; provided always, that the practice as to caution in such cases, and power to reclaim to the Inner-house, shall remain as at present, § 6.

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<sup>1</sup> Sect. 5 of the statute, regulating suspensions of decrees in absence in the Court of Session, has been already noticed in its place, *supra*, p. 308.

The relative A. S. 24 Dec. 1838, (*Bill-Chamber, &c.*), containing various regulations for carrying out the enactments of the statute, and schedules of forms of Notes of advocacy, suspension, and suspension and interdict, will be found printed in the Appendix.

As to intimation of notes of advocacy and suspension, see farther *supra*, p. 263 ; calling, p. 268 ; protestation, p. 282.

The competency of advocations, in cases passing through the Bill Chamber, and of suspensions, will often be discussed there, but if the point is one of difficulty, or requiring investigation, the note is generally passed, and the preliminary matter will be discussed in the Court of Session. "In general, in every case competent before an inferior judge, advocacy to the Court of Session is competent, unless it is expressly debarred either by statute or confirmed practice;—and on this principle the Court went in advocating from the Lyon Court the case of Dundas, 9 Jan. 1762, and Murray, 26 July 1775," (*supra* p. 32); *Tait's MS.* "Advocation." Where the question of incompetency is raised, "the Court of Session, as supreme civil court, is entitled to judge even in cases, where the merits are expressly withdrawn from its immediate cognizance, but in no case does the decision of the Court extend beyond the mere ground of advocacy;" Ivory, i. 98. In addition to what has been already stated regarding cases where advocacy is not allowed, we may notice that it is incompetent in the following instances:—In actions for payment of ministers' stipends, or the rents of their benefices, 1695, c. 27, (c. 51, Th. Ed. ix. 449); in actions founded on the statutes against profanity and immorality, 1696, c. 31, (Th. Ed. x. 65); in actions brought for any sum under £12 sterling, 1663, c. 9, (c. 3, Th. Ed. vii. 451), taken in connection with 20 Geo. II. c. 43, (*Herit. Juris. Act*, 1747), § 38, (*infra*, p. 451); in removings, 6 Geo. IV. c. 120; (*Judic. Act*, 5 July 1825), § 44, (*infra*, p. 452); and



in a variety of actions limited to particular courts by express statute, such as those from which justices of the peace, commissioners of supply, road trustees, police, &c., derive their authority. Advocation of maritime causes from the High Court of Admiralty was formerly incompetent; but that court is now abolished, and maritime causes tried in the sheriff courts may be reviewed, in the same manner as other causes; 11 Geo. IV. and 1 Wm. IV. c. 69, (23 July 1830), § 23.

Under the former poor law, the proper form of bringing the determinations of the kirk-sessions under review of the Court of Session was by advocation; *Higgins v. Heritors and Kirk-session of the Barony Parish of Glasgow*, 9 July 1824, iii. S. 239, (N. E. 168); *Pryde or Duncan v. Heritors and Kirk-session of Ceres*, 14 Feb. 1843, v. D. 532,—&c. &c.; that of complaining of their conduct in neglecting to provide for the poor, was by petition and complaint; *Telford v. Kirk-session of Ancrum*, 10 Mar. 1826, iv. S. 545, (N. E. 554). By the recent poor law statute, 8 and 9 Vict. c. 83, (4 Aug. 1845), § 74, any poor person whose allowance from the parish is deemed inadequate by the Board of Supervision, is entitled to receive a certificate to that effect, and to sue in *forma pauperis* in the Court of Session. Advocation, and not suspension and liberation, is the proper mode of proceeding against an interlocutor refusing aliment on the Act of Grace; *Roy v. Sharp*, 9 Mar. 1816; Hume, 497. See *infra*, sect. iv. When the magistrates awarded aliment to a party incarcerated for taking salmon in close time, the question of the liability of the incarcerating party to pay aliment in such a case was tried on a bill of suspension and answers and mutual cases, without a record, *Robertson v. Collins, &c.* 16 Feb. 1837, xv. S. 572. It is competent to advocate a cause immediately on the sheriff substitute's judgment being pronounced, without presenting a reclaiming

petition or appealing to the sheriff, but the Court do not approve of this mode of proceeding; *Malcolm v. Ballandene*, &c. 30 June 1835, xiii. S. 1021.

The prohibition against the advocacy of actions for sums under £12 sterling, has led to some discussion. Members of the College of Justice are entitled to advocate such actions, on the ground of privilege, but must do so *tempestive*, and not after pleading on the merits. The competency of all actions is judged of from the conclusions. If the libel in the inferior court, therefore, concludes for more than £12, an advocacy is competent, though decree has been pronounced for a less sum, and whether the pursuer or defender be the advocator, *M'Intosh v. Bennett and Williamson*, 14 Feb. 1795, M. 377; see *supra*, P. i. 2. 1, 2; *Ewing v. Hare*, &c. 27 Nov. 1822, ii. S. 47; (N. E. 41). If the value of the matter in dispute be uncertain, as where it is not a sum of money, but moveables, or if a right or principle be involved, advocacy has been held competent; *Marquis of Lothian v. Oliver and Fair*, 11 Feb. 1761, M. 374; *Steele v. Thomson*, 18 Dec. 1776, M. 375, and *Apx. Advocation*, No. 1; Hailes, 737; *Hunter v. Anderson*, 19 Jan. 1831, ix. S. 289. It may indeed be argued that the words of the statutes do not apply to such cases; *Tait's MS.* "Advocation." The expenses incurred in the action cannot be taken into view, in estimating the amount of the claim; *M'Intosh supra*; *Ersk. iv. 2. 43*, Note, Ivory's Ed. 991; but interest may, *Brown v. Chrystal*, 29 Jan. 1822, i. S. 275, (N. E. 257); "whether due *ex lege*, or *ex pacto*, or *ex mora*, if concluded for"; *Tait's MS.*, *ubi supra*; and, where advocacy is incompetent, it is equally incompetent to remit the cause with instructions, *Buchanan v. Ure*, 26 July 1750, M. 374; *Elch. Advocation*, No. 2, (see foot note); *Cuningham v. Cuningham*, 6 July 1775, M. 375. The consent of the respondent does not obviate the objection to an advocacy under £12; *Tomlie*, March 1780, M. 376. "In a pursuit for an aliment, though one year's aliment be under

£12, yet, if the libel includes in time coming, this will be reckoned. It has been doubted whether, where an action has been intended before the inferior court below £12, and decree pronounced which, by growing interest, has increased above £12, such action can be advocated. The point occurred 20 June 1778; *Wares v. Leburn*. Lords Covington and Westhall thought the original debt was the rule, also Monboddoo. Braxfield was clear of a contrary opinion, and thought that the time of advocation was the rule, and that if the debt at that time exceeded £12, this was enough. Consent of parties will not empower the Court to advocate a cause below £12. It was alleged that this was otherwise decided in the case of *Dallas v. Hugh McKaill*; but when stirred in a later case, *Tolmie v. Munro*, (*supra*), the Lords demurred, and, at advising, the party thought proper to elude the objection by bringing a declarator, July 1780. Processes for sums under £12 cannot be remitted with instructions, 5 Aug. 1777; *Petr. Irvine of Breulands and other Heritors in Zetland*"; *Tait's MS.* "Advocation." But "causes carried on before an incompetent judge do not fall within the statute, and may, therefore, be carried from the inferior court to the session, let the subject be ever so inconsiderable"; Ersk. iv. 2. 43. Suspension is, however, competent in all actions concluding for less than £12, even before extract; *Scott v. Shaw*, 14 Feb. 1826, iv. S. 462, (N. E. 468), and cases there quoted; see *supra*, p. 13, and *infra* p. 459, contrary to the ordinary rule, by which suspension is incompetent till the decree be extracted; *Turner v. Gray*, 9 July 1824, iii. S. 235, (N. E. 165). Advocations of decrees of removing are now incompetent, suspension being the only remedy, 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 44; consequently, an advocacy of an order of ejection in such a process cannot be received; *Gibson v. Scott*, 28 Jan. 1826, iv. S. 404, (N. E. 407). In an advocacy of conjoined processes of interdict and removing, and a

suspension of a decree of removing in the conjoined processes, the advocacy was held competent so far as related to the process of interdict only, and that it was competent to judge of the suspension, on its own merits, notwithstanding the contingency with the advocacy; *M'Nair v. Lord Blantyre's Tutors*, 9 July 1833, xi. S. 935. See *Ross v. Webster*, 12 Dec. 1833, xii. S. 200; *Flemings v. Morrison*, 4 June 1835, xiii. S. 859. An advocacy is competent, though the judgment sought to be advocated has been pronounced by the inferior judge, in consequence of a remit in a previous advocacy; *D. of Queensberry v. Barker*, 7 July 1810, F. C. 748. When the proceedings of an inferior court are wanted as evidence, a warrant ought to be craved for their transmission, for an advocacy, in such circumstances, is incompetent, unless it prays for an alteration of the judgment of the inferior court; *M'Leod v. M'Leod, &c.*, 9 July 1825, iv. S. 162, (N. E. 164).

An attempt has sometimes been made to evade the 50 Geo. III. prohibiting advocations of interlocutory judgments, (*supra* p. 441), by allowing the inferior judge to pronounce judgment by default, in consequence of a paper ordered not being lodged, and then advocating the cause. But, in such cases, the Court, without preparing a record, remits the cause to the inferior judge, with instructions to recall his interlocutor, and receive the paper, on the party paying such expenses in the inferior court, as the judge may think reasonable, and also the expenses incurred in the Court of Session; *Leslie v. Edie*, 1 Mar. 1828, vi. S. 674.

#### SECT. III.—FINAL JUDGMENT, WHAT.

The meaning of the term, "final judgment," having led to some dispute, the A. S. 11 July 1828, § 1, declares the meaning to be, "where the whole merits of the cause have been disposed of, although no decision has been given as to expenses, or, if expenses have been found due, although they

have not been modified or decerned for." Where damages therefore have been found due, but the amount of them has not been ascertained, or where certain principles merely have been fixed, but not applied, and so no final judgment pronounced, it is premature to advocate, *Stewart v. Cochrane and Bain*, 28 Jan. 1814, F. C.; *Thomson, &c. Petrs.*, 5 Mar. 1814, F. C.; *Brodie, &c. v. Brodie*, 8 June 1821, i. S. 52, (N. E. 55). But where an interlocutor, exhausting the merits, has been pronounced, it is no objection to the competency of an advocacy, that the reclaiming days in the inferior court have not expired, before the advocacy is presented, *Ross v. Taylor and Co.*, 30 June 1821, i. S. 97, (N. E. 98). It is *pars judicis* to enforce the statute, although it may not be pleaded. *Stewart*, supra. If a case is extractable, it is competent to advocate. Thus, a party having refused to appear to undergo a judicial examination, where his defence was prescription, and a decree being pronounced against him, an advocacy was held competent: *Hamilton v. Hamilton*, 13 Nov. 1824, iii. S. 283, (N. E. 199). Further, the whole merits of the cause must be exhausted, not only the merits of the action to which the advocator is a party, but also those of any other conjoined with it. If the parties in the conjoined action will not proceed to have it determined, the advocator ought to apply to the inferior judge, stating his intention to advocate, and praying him to call upon the parties to proceed with the conjoined process; and, failing their doing so, to disjoin the causes, which disjunction will render an advocacy competent, *Seymour v. Thomson*, 20 Jan. 1829, vii. S. 300; but see *Gammell's Trs. v. Miller*, 25 Feb. 1829, vii. S. 461. Again, it must appear, from the interlocutor of the inferior court, that the cause is exhausted. Thus, where there are several conclusions, and decree has been pronounced relative to some of them, there must be an absolutor or other judgment pro-

nounced as to the rest, before the advocacy be presented; *M'Kechnie v. Griffin*, 27 May 1829, vii. S. 665. On the other hand, advocacy is incompetent after the decree is extracted, even although the bill of advocacy may have been presented before extract, if the bill has not been intimated till afterwards; *Bell v. Ramsay*, 10 July 1821, i. S. 119, (N. E. 113). Where the whole merits of a case are exhausted, the addition of the words "with certification," or the omission of the word "decerns" in the interlocutor, will not prevent advocacy, *Anderson v. Moon*, 1 June 1836, xiv. S. 863. Where findings only have been pronounced laying a foundation for a final decree, advocacy is not competent, *Cameron v. Clephane and Sheills*, 29 June 1837, xv. S. 1220. In an action of filiation, an interlocutor finding the proof adduced, not sufficient to entitle the pursuer to her oath in supplement, (but allowing a proof by the defender's oath), is a final judgment in the sense of the A. S., *Nelson v. Baird*, 30 June 1838, xvi. S. 1249. It has been much doubted whether an interlocutor, granting or recalling an interdict, can be advocated without leave; *Gammell's Trs. v. Miller*, supra.

SECT. IV.—ADVOCATIONS OF CASES ABOVE £40, WHEN PROOF ORDERED.

Advocations against interlocutory judgments allowing a proof, are, however, now in some cases competent, without leave. Thus, by the 6 Geo. IV. c. 120, § 40, "it is declared, that in all cases originating in the inferior courts, in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts, (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery or production of papers), it shall be competent to either of the parties, who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session, by bill of advo-

cation, which shall be passed at once, without discussion and without caution; and in case no such bill of advocacy shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session, in so far as, by such judgment, the several facts established by the proof shall be found or declared."

The A. S. 11 July 1828, § 5, farther declares,—“If in such causes, the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply, by petition, to the judge in the inferior court, for leave to that effect; which application shall be intimated to the opposite party or his agent; and the petitioner shall be bound, if required by the judge, to give his solemn declaration, that the claim is of the true value of £40, and upwards; and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the judge, leave shall be granted to advocate; and the clerk of the inferior court shall certify the same;” *Matheson and Co. v. M'Kenzie and Co.*, 13 June 1832, iv. S. Jur. 512. “And it is farther enacted and declared, that if, in either class of cases, neither party, within fifteen days, in the ordinary case, and in causes before the courts of Orkney and Shetland, within thirty days after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocacy, such proof may immediately thereafter effectually proceed in the inferior court, unless reasonable evidence shall be produced to the inferior judge, that a bill of advocacy has been presented, or the judge be satisfied that effectual measures have been taken for presenting it; in which case, the inferior judge shall prorogate the time for

taking the proof for a reasonable time, not less than seven days, after that fixed for the first diet of proof, in the ordinary case, and not less then twenty days in cases from Orkney and Shetland; and if within these periods respectively, no intimation shall be made of any such bill of advocacy, the proof shall then proceed; and the bill, if such have been presented, together with the passing thereof, shall be held to fall, as if such bill had never been presented;" *M'Farlane or Graham v. D. of Montrose*, 24 Nov. 1826, v. S. 38, (N. E. 36); *Falconer, &c. v. Shiells and Co.*, 10 July 1827, v. S. 919, (N. E. 853); *Gill, &c. v. M'Ra*, 19 May 1832, x. S. 552. Where a proof on certain points had been taken by the sheriff, it was held incompetent to advocate under this provision, or where the proof ordered by the sheriff was in obedience to an order of the supreme court; *Gill, supra*. By § 126 of the A. S. 10 July 1839, (*Forms of Process in Sheriff Courts*), it is enacted that neither party shall take any proof except one allowed to lie *in retentis*, until after expiry of fifteen free days, in the ordinary case, and thirty days in cases before the courts of Orkney and Shetland, in order to give time for an advocacy; and unless the passing of a note of advocacy shall be intimated within the said periods respectively, the proof shall proceed, but of consent the proof may be taken without such delay.

The procedure in this class of cases is ordered by the A. S. 24 Dec. 1838, (*Bill Chamber, &c.*) to be the same as in advocations of final judgments, under the Act 1 and 2 Vict. c. 86, (10 Aug. 1838), (*supra*, p. 445), except that no caution shall be required; but the court in *Corry v. Anderson*, 12 July 1842, iv. D. 1514, held that the A. S. could not control the Judicature Act, and that therefore the Notes, in this description of cases, must pass through the Bill Chamber.

Where an action is raised in an inferior court for a sum



exceeding £40, and compensation to the whole amount is pleaded in defence, of which defence a proof has been allowed, advocacy without leave, and without a declaration of value, is competent; *Richmond v. E. of Kinnoul*, 27 May 1829, vii. S. 664. Farther, if the claim exceed £40, advocacy is competent, though the interlocutor allowing a proof applies to a part of the claim less than £40; *Baird v. Officer*, 9 June 1830, viii. S. 893. A judicial examination is not an order allowing a proof, in the sense of the above statute; *Turner v. Gibb and M'Donald*, 11 Feb. 1826, iv. S. 449, (N. E. 455). The bill or note of advocacy ought to set forth, that the matter in dispute is of the value of £40, though, in some cases, the omission has been overlooked; *Learmonth v. Morton*, 17 Jan. 1829, vii. S. 276. Here the question was one of possessory right. Where a sheriff's interlocutor allows a proof, *scripto vel juramento*, an advocacy under this section of the statute is incompetent, the Court holding that the allowance of proof meant by the 6 Geo. IV. is that of a proof at large, or *prout de jure*; *Hamilton v. Henderson*, 10 June 1837, xv. S. 1105. Where a remit had been made to tradesmen, in a case before a Dean of Guild court, to examine and report, followed by the judicial examination of the tradesmen, and subsequently a proof at large had been allowed, it was held by the Court that advocacy under § 40 of the act was incompetent; *Tulloch v. Mackintosh*, 10 Mar. 1838, xvi. S. 983. The meaning of the words, "all cases originating in the inferior courts," has led to some discussion; but they include summary applications originating by petition, as well as regular actions; *Richmond*, *supra*; *Tulloch*, *supra*; *Sands v. Meffan, &c.*, 20 Jan. 1829, vii. S. 290. In this last case, the point in dispute was a party's right to be admitted a procurator of an inferior court. The Court have intimated an opinion, that it is not imperative upon them to remit this class of cases when advoca-

cated to a jury; *Sands v. Meffan*, *supra*; *Baird v. Officer*, *supra*; M'F. 38.

SECT. V.—SUSPENSIONS WHEN COMPETENT.

The competency of suspensions in different cases has not been much discussed. In cases under the value of £12, suspension is competent before extract, *supra*, p. 13, and the same is true of summary orders, warrants, or interdicts of an inferior court, which may be recalled, at once, in a suspension; *E. of Hyndford v. Craig*, 17 Dec. 1811, F. C.; *Anonymous*, 6 July 1813, F. C.; and although not extracted; *Hunter v. Turnbull and Pontop*, 10 Mar. 1824, ii. S. 786, (N. E. 650), *M'Vey and Buchanan v. Sawers*, and *Christie v. Wilsons*, both dated 4 June 1825, iv. S. 70, (N. E. 73, 74). But the ordinary rule is, that suspension of a decree is incompetent, unless the decree be extracted; *supra*, p. 13. Suspension has even been held, in one case, an incompetent mode of reviewing a summary warrant of distress, because the process was not extracted; *Alexander v. Byrne*, 9 July 1824, iii. S. 243, (N. E. 171). A suspension of a decree of absolvitor is incompetent; the only remedy is to reduce the decree; *Danish Asiatic Co. v. E. of Morton*, 24 Feb. 1741, Elch. *Susp.* No. 5. If the decree, however, be extracted, suspension is competent, though no charge be given. This is called a suspension of a threatened charge. A suspension of a charge on a warrant of the Court granting interim execution is incompetent; *Clyne's Trs. v. Clyne*, 5 Dec. 1837, xvi. S. 191. It has been said that suspension of a charge on a decret arbitral, pronounced under a subscribed submission, is incompetent, reduction being the remedy; *New Form of Process*, (2d Ed. 1799), 270. See *infra*, P. iv. 8. 5, in *fin.* Where a party imprisoned for debt wishes to be liberated on the ground of bad health, his remedy is an application to the magistrates for liberation on a sick bill, under A. S. 14 June

1671, for it is incompetent to make the application in the form of suspension; *Goodsir v. Fleming*, 31 Jan. 1829, vii. S. 351. A suspension and liberation is competent where magistrates refuse a party the benefit of a sick bill; *Anonymous*, (*Bell v. Sterry and Co.*), 18 Nov. 1825, iv. S. 199, (N. E. 204); and same case, 10 Dec. 1825; *Ibid.* 306; *M<sup>r</sup> Donald v. Mags. of Inverness*, 1 Feb. 1826, iv. S. 411, (N. E. 414).

Suspension is, of course, incompetent where the decree or diligence has been put to full execution, or where the inferior court decree does not decern any thing to be paid or performed by the party; *M<sup>r</sup> Intosh, &c. v. Robertson*, 26 Nov. 1830, ix. S. 75. See also *Dick v. Thom and E. of Cassillis*, 11 Dec. 1829, viii. S. 232; *Bentham v. Brown and Richardson*, 28 June 1834, xii. S. 845; *Ewing v. Cheape and Campbell*, 24 Feb. 1835, xiii. S. 515. Reduction in such cases is the only remedy. Suspension and interdict is in like manner an incompetent form of complaining of the election of a public officer, who has been sworn into office, and has executed the duties for some time, *Lord Provost of Glasgow, &c. v. Abbey, &c.*, 3 Dec. 1825, iv. S. 266, (N. E. 271); but if he has not been sworn in and inducted, it is competent; *Watson, &c. v. Commissioners of Police of Glasgow and Denovan*, 10 Mar. 1832, x. S. 481. See, since the passing of the Municipal Reform Acts, the following cases of disputed elections of town-councillors, &c., *Monteith v. M<sup>r</sup> Gavin*, 29 Nov. 1837, xvi. S. 122; S. and M<sup>r</sup>L. iii. 290; *Dunlop v. Fleming*, xvi. S. 254; M<sup>r</sup>L. and R. 547; *Scott v. Mags. of Edinr.*, 21 Dec. 1838, i. D. 347. A suspension and interdict was held an incompetent mode of complaining of an election of a bailie of a royal burgh, at the instance of a minority of the council, the ground not being informality in the election, but that there should have been no election; *Orr, &c. v. Vallance, &c.*, 2 Dec. 1831, x. S. 93. But where the majority of the town-council of Edinburgh had

resolved to discontinue attending church in their official capacity, a note of suspension and interdict was passed to try the question of the legality of the resolution; *Urquhart, &c. v. Black, &c.*, 23 Dec. 1843, vi. D. 332. Where a party is molested in the exercise of an office, the right to which does not require to be declared, a suspension and interdict, not a petition and complaint, is the proper remedy; *Drysdale v. Magistrates of Kirkaldy and Cooper*, 30 June 1825, iv. S. 126, (N. E. 128). Suspension and interdict has been found incompetent to prevent a clerk signing the extract of a decree, *Goodsir v. Chalmers' Trs.*, 17 May 1821, i. S. 12; or to interdict the extractors from extracting protestation, *Graham v. Boosies*, 9 Mar. 1831, ix. S. 566, or to prevent the execution of a sheriff's decree for expenses; *Thom v. Symington, &c.*, 4 Dec. 1824, iii. S. 367, (N. E. 259). It was held no objection, however, to a suspension that it had been presented, after the suspender had offered a bill of advocacy, which was passed, but had fallen from the letters not being expedited in proper time; *Scott v. Reid*, 19 Dec. 1822, ii. S. 99, (N. E. 93). A suspension of a decree of an inferior judge is not necessarily incompetent, although the decree is not brought under review on the merits, for cases may occur where the question of expenses is independent of the merits; but where it is impossible to judge, whether expenses have or have not been improperly awarded, without forming an opinion on the merits, as the merits cannot be judged of in the suspension, it is incompetent, even though an action of reduction have been brought; *Scott v. King or Baillie, &c.* 26 Nov. 1831, x. S. 67; see *Whyte v. Vallance*, 14 Feb. 1835, xiii. S. 470; *Tweddel v. Duncan*, 6 Mar. 1840, ii. D. 808. The fact of the suspender raising a reduction, which may be necessary to enable him to get full relief, is not of itself a ground for passing the note of suspension, in any case; *Fleming v. Donaldson, &c.*, 28 June 1835, xiii. S. 347. See *Kay v. Rodger*, 11 Dec.

1829, viii. S. 241; *Hood v. Baillie*, 13 Dec. 1832, xi. S. 207. See *infra*, sect. xiv.

Although a bond contain a stipulation that no suspension of a charge upon it shall pass, except on consignment, it may be suspended on caution, *Forrester (Bank of Scotland) v. Walker and Hunt*, 27 June 1815, F. C., *Gilmour, &c. v. Finnie and Greig*, 8 July 1831, ix. S. 907. But consignment is required in a variety of cases, such as suspensions of decrees of the Court, *in foro*, A. S. 27 July 1599; A. S. 29 Jan. 1650; of charges by ministers for their stipends, by professors in universities, masters of schools for their salaries, directors of hospitals for their rents, 1669, c. 6, (c. 7, Th. Ed. vii. 557); 1696, c. 14, (Th. Ed. x. 58), and of charges at the instance of the general collector of the fund for clergymen's widows, 19 Geo. III. c. 20, (1779), §§ 55, 56. See Ivory, i. 121. In suspensions on consignment, the same procedure is followed as in suspensions without caution, or on juratory caution, A. S. 24 Dec. 1838, (*Bill-Chamber, &c.*), § 3. (*Infra*, p. 465).

#### SECT. VI.—PROCEDURE IN ADVOCATIONS AND SUSPENSIONS AFTER ENROLMENT.

The procedure in advocations and suspensions is very similar. Referring to a former chapter for the rules as to entering appearance by the respondent, (*supra*, p. 284), we shall now explain the procedure in the Outer house after the cause is enrolled.

The 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 48, enacts, that the Lord Ordinary “before whom any suspension or avocation shall come to be discussed, shall proceed in preparing the cause for judgment, after the manner already directed as to causes in the Outer house; and the party resisting the suspension shall be required, by way of defence in the Outer house, to return answers to the reasons of suspension.”

The act of sederunt, 11 July 1828, § 25, enacts, "that in every advocacy where the record has not been made up in the inferior court, and in every suspension at the lodgment of the letters for calling, reasons of suspension or advocacy shall be lodged therewith, and shall be, so far as depending on matter of fact, stated in an articulate form, with a note of pleas subjoined; and, if not so lodged, the letters shall not be called; and all answers to such reasons shall be in a corresponding form: and in the case of advocacy of a final judgment, where the record has been made up in the inferior court, the same, if not objected to in this court, shall be held to be the record in point of fact; but it shall be competent to the complainer, if he think it fit, to lodge with the letters a note of additional pleas in law; and it shall also be competent to the respondent, when he returns the letters, to return therewith a similar note of pleas; and, such being done, the record shall be declared closed.<sup>1</sup> But if it shall be alleged that the record has been improperly completed, by facts having been left out which ought to have been inserted, or which, from oversight or neglect, have not been stated, this shall be distinctly set forth as a reason of advocacy or of suspension, and the Lord Ordinary may, and shall, if he see cause, order a new record to be made and closed in this court, which shall be the record on which judgment shall be given in the cause; and, before allowing such record to be made up, he shall take into consideration the expenses previously incurred in the inferior court, and award them by an interim decree, if he see just, or reserve them till the final issue of the cause."

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<sup>1</sup> "The Lord Ordinary, in respect the record has been made up in the inferior court, and has not been objected to in this court, but held as the record in point of fact, (and that the advocator and respondent have severally lodged notes of additional pleas in law in this process), declares the record closed, and appoints parties' procurators to debate, (reserving the preliminary objection to the competency of the advocacy)."

Sect. 49 enacts, " That, in advocations and suspensions, the Lord Ordinary, proceeding to make up the record in this Court, may order amendments of, or additions to, the reasons of advocacy or suspension, and answers, or condescendences and answers, with notes of pleas, according as those steps, or either of them, shall appear necessary; and if condescendences and answers, with notes of pleas, be ordered, those, with the advocacy or suspension, shall form the record." When the reasons contain the whole grounds of advocacy, no condescendence should be lodged; *Mowat v. Sir J. Stewart*, 20 June 1828, vi. S. 1011.

By sect. 52, it is declared, " that in all advocations of final judgments of inferior courts, pronounced in causes which shall have been brought into these courts on or after the 1st Jan. 1826, the cause shall be debated upon the record, as made up in the inferior court and upon such additional pleas in law as shall have been lodged with the clerk, as herein before permitted; and, if it shall appear to the Lord Ordinary that the record has been improperly prepared in the inferior court, in consequence of defective statements by both or either of the parties, it shall either be competent to his Lordship to open up the record, and to proceed to the preparation of a new record, in common form, or to remit to the inferior judge, with instructions to that effect, and with power, in either case, to pronounce such judgment relative to the previous expenses, including those incurred in the inferior court, as the justice of the case may require." Where an objection to the competency of an action was stated on record in the inferior court, and in an advocacy, no alteration was made on the record, but a note of additional pleas was lodged, in which the plea of incompetency was not repeated, held that this plea was nevertheless still open to the party; *Bauchope v. Cox*, 6 Dec. 1832, xi. S. 175. See *Broumlie or Smith v. Lockhart*, 27 June 1846, viii. D. 926.

By the advocacy and suspension act of 1838 (1 and 2 Vict. c. 86, 10 Aug. 1838), considerable changes are introduced in the form of procedure in advocations and suspensions after they are enrolled. In advocations of final judgments, and suspensions of decrees of inferior courts *in foro*, (with the exceptions to be immediately noticed), the procedure is the same as on the former letters of advocacy and suspension respectively, § 1, 4; while in advocations of interlocutory judgments, and suspensions of decrees of inferior courts *in foro*, offered without caution, or on juratory caution, and in suspensions of decrees of removing, and generally, in all suspensions and interdicts, and advocations and suspensions, other than those above mentioned, the statement of facts, or reasons of advocacy, or suspension and answers, will be ordered to be revised, if parties are not ready to close the record; or condescendence and answers may be ordered, as in the case of ordinary actions, and the cause will thereafter proceed before the Lord Ordinary and the Court, in common form §§ 3, 4, 6. (As to Brieves, see p. 445 and p. 480). The sections of the statute are quoted, *supra*, p. 445, *et seq.*

When matter of fact is disputed in causes commencing in the inferior courts, and a proof shall be allowed and taken, "the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on, or is affected by, matter of law; but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlo-



cutor ; provided, however, that, except in consistorial causes, (see *supra*, p. 422), the Court of Session shall, in reviewing the sentences of inferior judges, have power to send to the jury court such issue or issues, to be tried by jury, as to them shall seem necessary, for ascertaining facts which may not have been proved to their satisfaction by the evidence already taken, or which may have been omitted in the cause, the verdict to be returned to the Court of Session to assist that court in the determination of the cause ; and the said court shall also have power to remit the whole cause for trial to the jury court ; and in neither of these cases shall it be necessary to have the consent of the parties to the cancelling of the depositions already taken in the cause, before proceeding to jury trial, but the Court of Session shall have power to give such directions with regard to the proof already taken, or with regard to any part or parts thereof, as to them shall seem just ; to which effect the provision in the foressaid act of the 59th year of his late Majesty (59 Geo. III. c. 35, § 14, 19 May 1819), in so far as the consent of the parties to the cancelling of the depositions already taken is thereby required, shall be, and the same is, hereby repealed : And farther, the Court of Session shall have power to remit the cause with instructions to the inferior court, if that course shall appear to them the most just and expedient, in the circumstances of the case ;" 6 Geo. IV. c. 120 ; (*Judic. Act*, 5 July 1825), § 40. Where a decision has been pronounced by a Lord Ordinary, without specifying the facts found proved, &c. as above required, the court, when the case was brought before them by reclaiming note, remitted it to the Ordinary to proceed in terms of the statute ; *Batchelor v. M'Gilvray*, 25 Jan. 1831, ix. S. 330. If the court do not consider any facts material to the case to be established by the proof, and throw it entirely out of view in deciding the case, it is not necessary that the interlocutor should be framed in terms of

this section of the act; *Haggart v. Miller*, 29 May 1838, xvi. S. 1058. The regulation of the statute must be observed by the Lord Ordinary on the Bills in refusing a bill of suspension of a charge on the decree of a sheriff proceeding on a proof; *Halley, &c. v. Gowans, &c.*, 9 July 1833, xi. S. 948, and case there referred to. See farther, *M'Nair v. Murray*, 21 Feb. 1829, vii. S. 451, and *Beattie v. Rodger*, 14 Nov. 1835, xiv. S. 6.

When a proof has been led in the inferior court, it has been held incompetent in a suspension of a charge upon a decree in the cause, to allow a proof by commission in the Court of Session, and the additional proof must either be adduced before a jury, or the cause remitted to the inferior court for the purpose, *Carrick v. Mather, &c.*, 17 Jan. 1827, v. S. 211, (N. E. 195). Farther, if the complainer has led a proof in the inferior court, and the term has been circumduced, he must pay the previous expenses before being allowed an additional proof of his averments, *Ibid.* If, however, the party who has led the proof be successful in the inferior court, he may be allowed to adduce additional evidence without payment of expenses, *Hunter and Co. v. Levy and Co.*, 10 June 1826, iv. S. 699, (N. E. 705).

As already mentioned, *supra*, p. 267, when suspensions or advocations, complaining of the judgment of an inferior court, are called, the inferior court process must be produced along with the note. The "production to the clerk of any inferior court of a copy, duly certified by the clerk of the bills, of an interlocutor of the Lord Ordinary on the Bills, either passing a bill of suspension or advocacy complaining of a judgment of such court, or ordering the process before such court to be produced in the Bill-Chamber," is a sufficient warrant for delivering up the process to the complainer's agent practising in the inferior court, on payment of the clerk's fees; A. S. 11 July 1828, § 10; 1 and 2 Vict. c.

86, (10 Aug. 1838), §§ 1, &c.; A. S. 10 July 1839, §§ 127, 128. If it is a suspension of a charge upon a bond, the charge ought to be produced with the answers to the reasons of suspension. If the decree under suspension was pronounced in a former process, a warrant for the transmission of the proceedings may be got from the Lord Ordinary.

No decision upon the merits of a cause, nor remit with instructions affecting the merits where appearance has been made, can be pronounced, without making up a record; (*supra*, p. 335); but as objections to the competency of an advocacy are analogous to dilatory defences to an ordinary action, such objections may be disposed of, without making up a record, *Leslie v. Edie*, 1 Mar. 1828, vi. S. 674; *Bruce v. Thomson*, 13 June 1828, vi. S. 972; *M'Ewen v. M'Lachlan*, 20 Nov. 1829, viii. S. 85; *Black v. Auld*, 19 Jan. 1832, x. S. 205; overruling *Falconer, &c. v. Shiells and Co.*, 11 July 1826, iv. S. 829, (N. E. 836); Bev. 341. Objections to the title to pursue, &c. in a suspension, are in a similar situation, *Ross v. Young and Lauder*, 14 Jan. 1831, ix. S. 275. Where a declinator of the jurisdiction of the inferior court has been proponed, it must be decided before any interlocutor on the merits can be pronounced, even though both parties are desirous to have judgment on the merits, *M'Donald, &c. v. Mackintosh, &c.*, 1 Dec. 1830, ix. S. 104. In *Henry v. M'Dougall's Trs., &c.*, 1 June 1832, x. S. 615, it was observed, that in an advocacy from a judgment of an inferior court regarding preliminary defences, it is competent for the Lord Ordinary, while he remits to repel them, to decide the question of expenses of the advocacy, though the defender intimate his intention to acquiesce in the judgment. See *supra*, p. 316, and *infra*, P. iv. 6. 5.

When gross irregularities have been committed in the management of the cause in the inferior court, as where a

decision on the merits has been pronounced without closing a record, the Lords will not allow the record to be made up in this court, but will remit to the inferior court to proceed according to law, and prepare a record, *Barbour v. Stewart*, 9 Mar. 1827, v. S. 559, (N. E. 525); *M'Ewen v. McLachlan*, 20 Nov. 1829, viii. S. 85; and, in such a case, if the complainer have not objected to the procedure in the court below, he will not be allowed expenses in the supreme court, *Doig, &c. v. Fenton, &c.*, 6 Mar. 1827, v. S. 533, (N. E. 501).

#### SECT. VII.—EXPENSES.

In advocations it was always competent to find the advocator entitled to his expenses, not only in this court, but also to those incurred in the inferior court; and the statute 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 46, as explained by A. S. 11 July 1828, § 8, authorizes the Lord Ordinary in the Outer house, or the Court, in the event of bills of suspension of decrees of inferior courts being passed, to find the suspender entitled to the expenses he has incurred in the inferior court, as well as in the Court of Session. These expenses cannot, however, be given in the Bill-Chamber, but only after the case has entered the rolls of the Court of Session. Originally no expenses could be awarded in the Bill-Chamber; but in virtue of A. S. 19 Dec. 1778, the suspender or advocator may be found liable in expenses there, but not the respondent.<sup>1</sup> These must be recovered in the Court of Session.—*Ivory*, i. 132, &c. For this purpose, if the charge is abandoned, the suspender may insist on the note being passed, unless his

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<sup>1</sup> While the case remains in the Bill-Chamber, the Inner-house do not pronounce decree for expenses (or indeed any other order) directly; they remit to the Lord Ordinary on the Bills, with instructions; see *Morison v. McKirdy*, 1 Feb. 1842, iv. D. 563.

expenses are paid him, *M'Aulay v. Brown*, 16 Feb. 1833, xi. S. 411. A mere general finding of the charger liable in expenses, does not carry the expenses of the suspender in the inferior court, *Graham and Sinclair v. Cuthbertson*, 20 Dec. 1828, vii. S. 224. In a suspension, the Court, it would seem, cannot remit to the inferior court to decide the question, as to the expenses in this court, *Corrie v. Barbour*, 24 June 1826, iv. S. 755, (N. E. 762). The Court, it would appear, are also entitled to find the respondent in an advocacy entitled to his expenses in the inferior court, although the respondent have not advocated, on the ground that expenses have been refused; for the advocacy of the case upon the merits, would seem to bring up incidental matters like expenses, without the necessity of a separate advocacy, on the point of expenses, *Murdoch and Brown v. Wyllie and Noble*, 8 Mar. 1832, x. S. 445; *Eisdale v. Archer*, &c. 28 June 1832, S. Jur. iv. 544; see *supra*, p. 443. When the Court remit a case to the sheriff, with instructions to repel the dilatory defences, it is competent, in reference to 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 5, to give power to the sheriff to decide all questions of expenses relative to said defences, *Henry v. M'Dougall's Trs., &c.*, 1 June 1832, x. S. 615.

#### SECT. VIII.—INTERIM POSSESSION.

In all advocations of interlocutors “pronounced by sheriffs, it shall be competent to the inferior judge to regulate in the meantime, on the application of either party, all matters regarding interim possession, having due regard to the manner in which the mutual interests of the parties may be affected in the final decision of the cause; and such interim order shall not be subject to review, except by the Lord Ordinary, or by the Court, in the course of discussing the process of advocacy,—reserving to the Court of Ses-

sion, or Lord Ordinary, full powers, during the course of the discussion of the cause in the said court, to give such orders and directions, in respect to interim possession, as justice may require"; 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 42; A. S. 11 July 1839, (*Sheriff Courts*), § 130. By 1 and 2 Vict. c. 86, (10 Aug. 1838), § 4, it is enacted, "that in all cases of suspension, it shall be competent to the inferior court, or the Court of Session, to regulate all matters regarding interim possession, in like manner as is, by the present law and practice, competent in the case of advocations."

SECT. IX.—FORM OF INTERLOCUTORS.

In an advocacy, if the judgment of the Court be unfavourable to the advocator, the cause will be remitted *simpliciter* to the inferior court. If it be favourable, an interlocutor will be pronounced, advocating the cause, and assolzieing the advocator, or giving whatever other decision may be suited to the circumstances of the case; or a remit may be made, with instructions, without advocating the cause. When there is a remit, there is no decerniture, the case being sent out of court; but where the judgment of the inferior court is to be varied or altered without a remit, the first part of the interlocutor must "advocate the cause," so as to remove it to the Court of Session; otherwise, any findings which may be inserted are properly not extractable. In an unreported case, *Ivory and Co. v. Douglas and Co.*, June 1812, an application was made for execution pending appeal; but the Court found that the application could not be granted, owing to a mistake of this kind, as the matter was not extractable, and the error could not be corrected, owing to the appeal.

When expenses are found due, on remitting a cause, an



## SECT. X.—OF DISCUSSING THE REASONS ON THE BILL.

Besides the former mode of bringing Suspensions and Advocations into court, by letters duly signeted, another and more compendious mode was also in use. It was first introduced by statute, in cases peculiarly favoured, viz. suspensions from the Admiralty Court, 1681, c. 16, (c. 82. Th. Ed. viii. 351), and suspensions of charges for ministers' stipends, &c., 1 and 2 Geo. IV. c. 39, (28 May 1821), § 2.

Where the charger or respondent was satisfied, or feared that, in spite of all his opposition in the Bill Chamber, the bill would be passed, and was, at the same time, anxious to avoid the delay occasioned by the procedure, previous to bringing the case into the Outer house, he might have presented a petition to the Inner house, craving warrant to discuss the reasons summarily on the bill. The petition craved the Court to discharge the clerk of the bills, writers to the signet, and the keeper of the signet, from writing upon, expediting, or signeting the bill or letters; to grant warrant for discussing the reasons upon the bill; and to remit to a Lord Ordinary to discuss the same. On the petition being granted, the case was enrolled in the hand roll of the Lord Ordinary instead of the weekly (printed) roll.

Since the passing of the Judicature Act, and the introduction of the new forms of proceeding, this summary mode of introducing suspensions and advocations into the Court of

## IN SUSPENSIONS AND INTERDICTS.

*If unfavourable to the suspender* :—"Having heard parties' procurators, &c., repels the reasons of suspension, refuses the interdict, and decerns, &c."

*If favourable to the suspender* :—"Having heard parties' procurators, &c., sustains the reasons of suspension,—suspends, prohibits, interdicts, and discharges, in terms of the note of suspension and interdict; declares the interdict formerly granted perpetual, and decerns, &c."



Session is no longer applicable; *White, &c. v. Muckersy*, 24 Dec. 1836, xv. S. 312.

In suspensions of charges on bills, forgery is often pleaded. The form of procedure in such cases is explained when treating of reductions; *infra*, P. iv. 8. 12. If forgery, however, be not pleaded *tempestive*, it will not be received in a suspension; and the mere executing of a summons of reduction will not render it a valid ground of suspension; *Provan v. Gray*, 29 June 1821, i. S. 92, (N. E. 94); *Paterson v. Sparrow and Co.*, 18 Dec. 1821, i. S. 243, (N. E. 213); *M<sup>r</sup> Arthur v. Paterson*, 3 Mar. 1825, iii. S. 608, (N. E. 427); *supra*, p. 461.

#### SECT. XI.—OF TURNING CHARGE OR DECREE INTO A LIBEL.

In order to save delay, expense, and the multiplying of proceedings, the Court are in the practice, where a charge or decree is informal, though the debt charged for may be due, to allow the charge to be turned into a libel,<sup>1</sup> which has the effect of holding the charge as a citation on an ordinary summons, to which the suspender may state his defences. As this is in a great measure matter of discretion with the judge, it is not possible to lay down any precise rules as to what defects or errors will prevent a decree or charge being turned into a libel. Thus, the objection that the protest on which the charge proceeded, has not been recorded, till more than six months after its date, has been disregarded, in several cases; *M<sup>r</sup> Ready v. Crawford*, 30 July 1715, M. 11,984; *Gordon v. Milnes*, 13 Feb. 1822, i. S. 352, (N. E. 293). Even nullities have in some cases been held insufficient to bar this form of redress, as where a decree in absence was taken against a party while not in the

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<sup>1</sup> "Having heard parties' procurators, repones the suspender against the decree charged on, and turns the same into a libel."

country, and while he had neither domicile nor property in Scotland; *Herbertson and Co. v. Rattray, &c.*, 12 June 1793, M. 2157; where the partibus was erroneous, and decree had been taken in absence, *Allan v. Harrison*, 13 Jan. 1825, iii. S. 429, (N. E. 301)<sup>1</sup>; where the suspender had not been cited to the action, in which the decree was pronounced; *Fraser v. Fraser*, 26 Feb. 1825, iii. S. 590, (N. E. 405); *Caldwell, &c. v. Campbell*, 5 Mar. 1829, vii. S. 545. It was held competent to turn a charge upon an invalid decret arbitral into a libel, to the effect of making a reference to oath; *M'Kessock v. Drew*, 14 Nov. 1822, ii. S. 13, (N. E. 11). But the Court refused *hoc statu* to turn the charge on a bill (which was under £25) into a libel, it being alleged that *ex facie* of the bill, it could not be the foundation of summary diligence; *Forrest v. Thomson*, 13 June 1834, xii. S. 726. It has, however, been held that where the bill was objectionable under the stamp laws, a charge proceeding upon it could not be turned into a libel; *Fleming and Leiper v. Scott*, 1 July 1823, ii. S. 446, (N. E. 398); or, where the charge proceeded upon an instrument of protest, null under those laws; *Corrie v. Barbour*, 20 Dec. 1827, vi. S. 268.

It was at first doubted whether, after the passing of the Judicature Act, a charge could be turned into a libel at all; and it is now fixed, that it cannot be done after the record is closed; *Campbell v. Macdonell*, 22 Feb. 1827, v. S. 412, (N. E. 391); *Henderson v. Thomson*, 21 Feb. 1834, xii. S. 469; but that it may, at any time before, *Caldwell v. Campbell*, *supra*; *Douglas v. Smith*, 9 Feb. 1830, viii. S. 473. The form of turning a charge into a libel is of rare occurrence in our present practice. As, however, when it does occur, it is done by the equitable permission of the Court, and proceeds on the

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<sup>1</sup> This was in a reduction, not a suspension. (See Report, foot note).

assumption of irregularity on the part of the charger, he must indemnify the suspender for the expenses he has thereby incurred; and as these cannot in general be ascertained at the time, they will be reserved till the issue of the cause. The form of making up the record, after the charge has been turned into a libel, is the same as that in an ordinary action; *Caldwell*, *supra*; *Douglas*, *supra*.

Where a decree is turned into a libel, not only the decree and charge, but the libel in the inferior court, is before the Court, and consequently the Lords may decern for whatever is concluded for in the libel, though not contained in the decree. Thus, higher damages may be given than those contained in the decree complained of; *Clerks, Petrs.*, 4 July 1752, M. 11,994, Elch. *Suspension*, No. 7; *New Form of Process*, (2d Ed. 1799), 302. It will, however, be kept in view, that no amendment of the libel can take place in such a case, because the libel, being the record of the inferior court, cannot be altered; *Begbie v. Anderson*, 12 Jan. 1743, M. 11,988.

SECT. XII.—FINDING OF NEW CAUTION WHEN CAUTIONER  
BECOMES BANKRUPT.

Formerly, when a cautioner became bankrupt, or died unrepresented, during the discussion of a suspension, it was incompetent to apply for new caution, *Govan v. Gray*, 13 Dec. 1794, M. 15,161; but this defect was remedied by A. S. 11 July 1828, § 118, which enacted that, “in every process of suspension of a *liquid* obligation, in which caution has been or may hereafter be found, it shall be competent to the party entitled to the benefit thereof, in case the cautioner shall have been sequestrated, or become notour bankrupt, or have executed a trust-disposition for behoof of his creditors, or have called a meeting of his creditors to consider the state of his affairs, or shall have died unrepresented, to present a note, the same being previously intimated in common form, stating the circumstances which have emerged, and praying the

division in which the proceeding may for the time depend, to order new caution to be found, and the division shall pronounce such order therein, as the justice of the case shall require." Where a cautioner in a suspension has become bankrupt, no discussion can be allowed as to the propriety of caution having been originally ordered to be found, or as to the effect of new circumstances emerging, when the application for new caution is made; *Murray v. Smith, &c.*, 11 Mar. 1830, viii. S. 708. Although the cautioner in an advocacy has become bankrupt, the respondent is not entitled, as of right, to insist for new caution, and where the principal sum was consigned, and a mandatory for the advocator had been sisted who was liable for expenses, an order for a new cautioner was refused, *Kay v. Fraser*, 26 Feb. 1833, xi. S. 441. The death of the advocator will not free the cautioner, and his obligation will continue where the executor of the advocator sists himself and carries on the litigation, although notification of the death of the advocator may not have been sent to the cautioner; *Wilson, &c. v. Ewing, May and Co.*, 20 Jan. 1836, xiv. S. 262. The charger on the sequestration of the cautioner's estate, applied to the Court under the A. S. to have the suspender ordained to find new caution, and on his failure, but without discussing the merits, obtained decree finding the letters orderly proceeded, the original cautioner was held not liable to implement that decree; *Eadie v. Smith, &c.*, 19 Feb. 1833, xi. S. 415. A bond of caution in a suspension being lodged before giving in answers to the bill, it was held that the cautioner could not withdraw, although the bill had been refused at the time of intimation of withdrawing, but afterwards passed, on a reclaiming petition to the Inner house, of consent of the charger; *Crawford v. Lynde, &c.*, 26 May 1819, F. C. In the case of *William Bell, &c. Petrs.*, 24 Dec. 1836, xv. S. 313, the court granted warrant to the clerk on the bills to

deliver up to a suspender the bond of caution in the depending process of suspension at his instance, in respect of his producing a new bond of caution, reported by the clerk on the bills to be signed by sufficient cautioners. If the suspension is submitted to a judicial reference without the knowledge or consent of the cautioner, he will not be liable to pay the sum awarded to the charger, under a decree proceeding on the award of the referee; *Stewart v. Hickman and Marriott*, 1 Dec. 1843, vi. D. 151. See *supra*, p. 412. In admiralty cases new caution may be required from the charger, on failure of his original cautioner *de damnis et impensis*; *Gillies v. Smith*, 19 Jan. 1832, x. S. 209. Where it was fixed by final interlocutor that the bankrupt, pursuer of a reduction, could only insist on finding caution for expenses, and he found a cautioner and attestor, but the attestor became bankrupt during the preparation of the cause, it was held that the defender might object, before the Lord Ordinary, to farther procedure, until a new attestor should be found, and that the A. S. 11 July 1828, § 118, did not apply; *A. B. v. C. D.*, 29 Nov. 1836, xv. S. 158.

SECT. XIII.—CAN OLD DILIGENCE IN SUSPENSION BE PUT  
IN FORCE.

When, after discussing a suspension, the letters have been found orderly proceeded, it has been said not to be competent to proceed with the old diligence, to the effect of poinding the debtor's effects, or apprehending his person; but the effect of arrestments, it is admitted, remains entire, as the suspension does not hinder the charger using arrestment, inhibition, or perhaps adjudication, although it prevents a poinding as well as personal diligence, *Keltie v. Wilson*, 18 Dec. 1828, vii. S. 208. If it be therefore wished to proceed with diligence against the debtor, the decree finding the letters orderly proceeded must be extracted, and it is said

that new diligence must be raised on it, Bev. 365; and even where the suspension has only been of a threatened charge, it is held, by Lord Kilkerran, incompetent to raise letters of horning on the ground of debt, after the discussion, *Russel v. Scot*, 28 Feb. 1751, M. 8123. It is stated, however, in a work of authority, (Ivory, i. 263), that if the final judgment be favourable to the respondent, the old diligence may be proceeded with, after the decree finding the letters orderly proceeded is extracted, and this opinion is supported by an old case; *Dick v. Chapeland, &c.*, 18 Jan. 1681, M. 15,158. It will also be observed, that in the above case of *Russel*, the decree was not extracted. The opinion from the work just quoted, is farther supported by the uniform style of the decree, sanctioned by Act of Parliament, 50 Geo. III. c. 112, (20 June 1810), schedule D, which not only finds the letters orderly proceeded, but "ordains the same to be put to further execution." Where expenses are found due, they can only be recovered under that decree; and it must be extracted before any additional step can be taken upon the old diligence. On producing the extracted decree at the Bill Chamber, an extract of the bond of caution will be furnished, on which warrant for diligence in execution will be obtained against principal and cautioner, jointly and severally, for the amount of the expenses decerned for, and principal sum in the bond. If there be an attestor of the cautioner bound *subsidiarie*, he may also be proceeded against, but he ought not to be charged, until the principal and cautioner are discussed. Where no discussion has taken place before the Ordinary in the Outer house, but the note of suspension has fallen by refusal in the Bill-Chamber, or by protestation, then the old diligence may be proceeded with; but in the case of a refused note, a certificate of refusal must be obtained before this can be done; *Wilson v. Thomson, &c.*, 28 Feb. 1824, ii. S. 762, (N. E. 633); A. S. 24 Dec. 1838, § 8.

## SECT. XIV.—CONCLUSION.

If the principal suspender abandons the case, the cautioner may sist himself as a party, and discuss the reasons of suspension. And it is usual to intimate the abandonment to the cautioner as well as to the trustee for a bankrupt.

It is often necessary for a suspender, to enable him to state his pleas properly, to raise and conjoin, or to repeat a summons of reduction. *Supra*, p. 461; *infra*, P. iv. 8. 1, 2, 14, 15.

## SECT. XV.—ADVOCATION IN SERVICES.

It is now unnecessary to notice at length the mode of procedure in advocations of services in the old form, before the abolition of brieves. See 1 and 2 Geo. IV. c. 38, (28 May 1821), § 11; *Jardine, &c. v. Currie*, 8 July 1825, iv. S. 158, (N. E. 159); 1 and 2 Vict. c. 86, (10 Aug. 1838), § 2; *Pollok or Tennant v. Pollok*, 16 Dec. 1841, iv. D. 269, and S. Jur. xiv. 107; *L. Lovat v. Fraser*, 17 Nov. 1842, v. D. 131. The late Service of Heirs' Act, 10 and 11 Vict. c. 47, (25 June 1847), § 17, declares, In all cases in which there are competing petitions conjoined, or in which any person has competently appeared to oppose any petition of service presented to the sheriff, it shall be competent to such of the parties as may conceive the case proper to be disposed of by jury trial, at any time before the proof is begun to be taken by the sheriff, to present a note of advocation to the Court of Session, praying the Court to advocate the proceedings, in order that the case may be tried by a jury; which note of advocation shall be proceeded with in like manner with notes of advocacy, presented with a view to jury trial, against judgments of the sheriff courts of Scotland, according to the existing practice, (*supra*, p. 455); and such judgment shall be pronounced on the said note of ad-

vocation as shall be just; and, in the event of its appearing proper that the case should be tried by a jury, the proceedings shall be in the usual form; and in every case in which the jury shall find a verdict in favour of a party petitioning to be served, the Court shall, at the same time with applying such verdict, remit to the sheriff from whom the case was advocated, with instructions to pronounce a decree, serving the said party in terms of this act.

By § 18, it is farther enacted, that in every case in which the sheriff has refused to serve a petitioner, or dismissed his petition, or repelled the objection of an opposing party, it shall be lawful to bring the judgment under review by note of advocacy: Provided that such note shall be presented within fifteen, or where the proceedings have been taken in the courts of Orkney or Shetland, thirty days from the date of said judgment; and that where the judgment has been pronounced after opposition duly entered, or in competition, such note shall be intimated to the opposite party, and a bond of caution for expenses be lodged with the sheriff-clerk in like manner, and under the same regulations, as in the case of advocations of final judgments of the sheriff courts of Scotland, according to the presently existing practice, (*supra*, p. 445); and such note shall be proceeded with in like manner with the notes of advocacy against final judgments aforesaid; and it shall be competent to the said Court, if it shall appear necessary for the right determination of the case, to allow farther or additional evidence to be taken, or to remit to the sheriff to take the same, or to appoint the case, or special issues therein, to be tried by a jury: Provided, that in every case in which the sheriff has refused to serve, but in which the Court of Session shall be of opinion that the party ought to be served, a remit shall be made to the sheriff, with instructions to pronounce a decree serving the said party: Provided also, that nothing herein contained shall prejudice the right of any person



whose petition of service shall be refused, without any opposing or competing party having appeared and been heard on the merits of the competition, to present a new petition at any time thereafter, or the right of either party in any of the proceedings hereby authorized in the court of the sheriff, to bring under challenge whatever judgment may be pronounced therein, by process of reduction on any competent ground.

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## CHAPTER XIII.

### OF VARIOUS INCIDENTAL PROCEDURE.

#### SECT. I.—OF REPONING AGAINST INTERLOCUTORS WHICH HAVE BECOME FINAL THROUGH MISTAKE.

THIS power was conferred on the Court, by the act 48 Geo. III. c. 151, (4 July 1808), § 16, in the following terms: "If the reclaiming or representing days against an interlocutor of a Lord Ordinary, shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor, by petition, to the review of the division to which the said Lord Ordinary belongs; but declaring always, that in the event of such petition being presented, the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party."<sup>1</sup>

The power of reponing is limited to those cases where the party has not intended to acquiesce in the interlocutor, but by inadvertence, or not attending to the forms of process, the interlocutor has become final; *Innes, Petr.*, 14 May 1822,

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<sup>1</sup> In practice this section of the statute has been given effect to, since the passing of the Judicature Act in 1825, although the latter statute limits the period of review of interlocutors to twenty-one days, and abolishes reclaiming petitions, (§ 18).

i. S. 401, (N. E. 377); *Gillespie's Reprs. v. Quéensberry Exers.* 26 Jan. 1826, iv. S. 391, (N. E. 394); *Mills v. Hamilton*, 6 June 1829, vii. S. 716; *Plock, &c. v. Wallace*, 16 Dec. 1841, iv. D. 271. All attempts to be reponed have been rejected, where it was plain the parties had acquiesced in the judgment at the time, and purposely allowed it to become final, but afterwards wished it opened up, on farther consideration, or in consequence of their taking new views of their case, *Brock v. Brown's Trustees*, 8 July 1826, iv. S. 815, (N. E. 822); *Ferrier v. Mudie*, 31 Jan. 1829, vii. S. 349. In *Williams v. Macnee*, 12 June 1841, iii. D. 1014, the allegation of the party that he had been under a mistaken belief, that the proper time for reclaiming against the interlocutor, which contained special findings on the merits of the cause, was, when those findings should come to be applied by a subsequent interlocutor and decree, was held not to bring the case within the remedy of the statute. Even where the interlocutor had become final, apparently through mistake, the party having proceeded with the cause, without applying to be reponed, and being afterwards found liable in expenses, was not allowed to be reponed under the above act, *Ramsay v. Marshall*, 22 Feb. 1823, ii. S. 238, (N. E. 210). The Lord Ordinary may allow a minute and answers as to the alleged mistake or inadvertence, *Babington v. Newall, &c.*, 20 Feb. 1841, iii. D. 611. The party availing himself of the Lord Ordinary's permission, must proceed by reclaiming note, not by petition, *Bennet, &c. v. Pyper*, 19 Feb. 1833, xi. S. 414.

The Court have also rigidly adhered to the rules above laid down. Thus, the payment of expenses can in no case be dispensed with, even though there has been a previous interlocutor pronounced, finding expenses due to neither party, *Thom, Petr.*, 24 May 1811, F. C.; or where the party is on the poors' roll; *Pratt v. Lord Dundas and J. Bruce*, 9

June 1824, iii. S. 120, (N. E. 79). See also *Bennet, &c.*, supra; *M'Ra v. Birtwhistle's Trustees*, 11 Mar. 1831, ix. S. 582. It is also incompetent to petition the Court to be reponed, without applying to the Ordinary for leave; *Mills*, supra; *M'Ra*, supra; *Young v. Cooper*, 29 June 1824, iii. S. 189, (N. E. 129). Though leave be granted by the Lord Ordinary to apply to the Court, the application to be reponed may be opposed on the merits by the other party, without reclaiming against the interlocutor giving leave, although it is perfectly competent to do so; *Brock v. Brown's Trustees*, 8 July 1826, iv. S. 815, (N. E. 822). In *Forbes, &c. v. Traill, &c.*, 17 June 1843, v. D. 1212, the Court, without deciding the question as to the competency of reclaiming against the Lord Ordinary's refusal of leave, held, that in the circumstances of the case, the party was not entitled to be reponed. See also *Babington*, supra, where it was farther observed by the Lord Ordinary (Jeffrey) that he might have been induced to extend the benefit of the statute, to a case in which the necessity for it had been brought about by any *mala fides*, or deceptive proceedings of the opposite party.

The above statute has been held to apply to the Bill Chamber; and the expenses to be paid in an advocacy are not the whole expenses incurred in the Court of Session and inferior court, but those incurred in the Court of Session only; *Arnot v. Thomson*, 4 Feb. 1826, iv. S. 427, (N. E. 432). The statute applies to proceedings in sequestrations. *Plock, &c.* supra.

Care must be taken, where an interlocutor has thus become final, to apply to the Lord Ordinary, without delay, for leave to petition, for if the process is once extracted it is of course incompetent to make any such application, and relief cannot be granted in a suspension; *Stewart v. Leslie*, 10 Dec. 1811, F. C. Where an appeal had been delayed with the view of allowing a party to bring up before the House of Lords a subsequent decree which had been pronounced in the

process, and which had been allowed to become final, and to be extracted, through inadvertence in allowing the reclaiming days to expire, the Court holding that the process had been taken out of court by the extract, refused to entertain a reclaiming note, under the act 48 Geo. III. without a remit from the House of Lords. *Alexander*, 17 June 1845, vii. D. 884. In this case the point was noticed whether the statute applies to final extracted decrees.

In *Stewart v. Leslie*, supra, the Lord Ordinary held that an interlocutor thus becoming final, and being extracted, was to be considered a *decree in foro*, and so it undoubtedly was before the date of the 48 Geo. III.; but in the case of *Pratt*, supra, it was observed on the bench, that such a judgment would not form *res judicata*, so as to preclude a new action.

It was once found, that where a party had been reponed on payment of expenses, and had afterwards gained the cause on the merits, with expenses, he was entitled to repetition of the costs he had previously paid, *Brumby, &c. v. Ogle*, 14 Nov. 1822, ii. S. 15, (N. E. 12); but it was subsequently held in another case, on a consultation of the judges, that this decision was erroneous, *Stewart v. Lang*, vi. S. 488, Note.

#### SECT. II.—OF RES NOVITER VENIENS AD NOTITIAM.

The discovery of circumstances formerly unknown has been, from an early period of our practice, allowed to be a sufficient ground for reviewing a judgment; *Auchmoutie v. Laird of Mayne*, 25 Nov. 1609, M. 12,126. The act of sederunt, 20 Nov. 1711, § 15, declares, that the Lords "will not for hereafter receive or hear any third reclaiming bill, unless upon new matters of fact, and sufficient evidence given for verifying that it is recently come to the party's knowledge;" and the act of sederunt, 26 Nov. 1718, extends this regulation to second reclaiming bills. The act of sederunt, 7 Feb. 1810, enacts, that the condescendence and answers shall absolutely foreclose both parties in point of fact, "ex-

cept on proof of *noviter veniens ad notitiam*, or unless such fact be formally set forth in a supplementary condescendence, to be received only with the special leave of the Lord Ordinary or the Court, as the case may be, and under such order as to expenses, as the Lord Ordinary or the Court may judge proper.

The 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 10, enacts, "that no amendment of the libel, or new ground of defence, shall be allowed after the record shall have been thus completed, under the exception hereafter to be mentioned, the pursuer having it in his power notwithstanding to abandon the cause on paying full expenses or costs, to the defender, and to bring a new action, if otherwise competent; provided always that it shall be competent to either party in the course of a cause to state matter of fact *noviter veniens ad notitiam*, or emerging since the commencement of the action, if on cause shewn, leave shall be obtained from the Lord Ordinary or the Court so to do, the said party always paying, previous to stating such new matter on the record, such expenses as may be deemed reasonable by the Lord Ordinary or the Court; and if leave be granted, the new matter shall, within a time to be limited, be stated in the shape of a specific condescendence framed as above, accompanied by a note stating the plea in law arising therefrom; and the adverse party shall in such case be ordered, within a reasonable time, to put in his answer to such condescendence and plea, to be adjusted and made a part of the record as before directed."<sup>1</sup> The Court, if deemed necessary, will

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<sup>1</sup> Admission of new *Fact* on record. "Having heard parties' procurators upon the new facts alleged by A. B., appoints him within days from this date, to lodge a condescendence thereof, accompanied with a note of pleas in law: and when lodged, allows C. D. to see the same, and lodge answers thereto, with a note of pleas in law, within days thereafter." See the form of admitting a new *Plea* on record, *supra* p. 332.

allow a new record to be made up, *Strong v. Martin*, 11 Mar. 1840, ii. D. 838. It is imperative under the statute that the Lord Ordinary should pronounce a finding as to expenses, though these should be modified to one shilling, *White v. Forbes*, 19 June 1845, vii. D. 886.

By the act of sederunt, 11 July 1828, § 59, the farther regulation is made, "That after closing the record, where either party wishes to state on the record matter of fact *noviter veniens ad notitiam*, or emerging since the commencement of the action, he shall enrol the case for that purpose, furnishing to the opposite party, at least forty-eight hours before the enrolment, a condescendence of such new matter; and in like manner, if either party wish a new plea or ground in law to be stated on the record, he shall enrol the cause, and furnish the said new plea to the opposite party forty-eight hours before the enrolment;" see *supra* p. 332.

Regarding the production of papers, § 55 enacts, "And after the record is made up and closed, it shall no longer be competent for the party in any case to produce any writing which was in his possession, or within his power, at the time of completing the record, unless he shall instruct that it is *noviter veniens ad notitiam*; but it shall be competent to the parties to apply for a diligence for recovery of writings *in modum probationis*, or to produce such writings previously in their power as may be rendered necessary by the production of papers made by the other party, after the record is closed."

To entitle any circumstance to be held as *res noviter veniens ad notitiam*, or any writing to be considered as *noviter reperi-tum*, it is necessary, not only that the party have been *de facto* ignorant of the circumstances, or of the existence of the writ, but that he must necessarily have been unacquainted with their existence. The cause of ignorance must be explained, and the facts must bear closely on the points at issue. If the facts could have been known by proper inquiry there is

no ground for the plea, *Dundas v. Aitken*, 9 Mar. 1810, F. C.; *Magistrates of Dunbarton v. Campbell, &c.*, 18 Nov. 1813, F. C.; affirmed on appeal, xix. F. C. 769, and *v. Dow*, 266. Thus, a circumstance once known, but which the party has forgot, is not *res nova*, *Barbour v. M'Gauchie*, 14 Nov. 1828, vii. S. 18; nor a judgment of a court of law, finding a party has not a right he supposed he had; *Ferrier v. Mudie*, 31 Jan. 1829, vii. S. 349. In *Bell v. Bell*, 14 April 1819, Mur. ii. 135, a motion for a new trial on alleged *res noviter* was refused, on the ground that if the pursuer did not know the facts before the trial, he might have done so. But a new trial was granted in different circumstances; *Bannerman v. Scott, &c.*, 24 Nov. 1846, ix. D. 163. On the same grounds, deeds in a public record cannot be held as *noviter reperta*, *Grahame v. Grahame*, 29 May 1821, i. S. 35; Aff. 14 June 1825, i. W. and S. 353, and still less if they are in the possession of the party himself, *Magistrates of Dunbarton*, *supra*. In our former practice, the Court were inclined to allow the party to be reheard, on finding new documents in his own possession, if he paid the previous expenses, but not otherwise, *Livingston v. York Building Co.*, 28 Nov. 1776, v. Sup. 455; but this was refused in *Irving v. Sweetman*, 14 June 1821, i. S. 68, (N. E. 67); see, however, *M'Whirter v. Guthrie*, 14 Feb. 1822, i. S. 354, (N. E. 295); and *Gordon v. Trotter*, 24 Nov. 1831, x. S. 47.

On a like principle as *ignorantia juris neminem excusat*, a plea in law can never be held as *noviter veniens*, *Laird Touch v. E. of Hume*, 9 June 1624, M. 12,129; but a regulation is made by the above act of sederunt, for receiving a new plea in law after the record is closed, a proceeding which was formerly allowed only on payment of the whole previous expenses; *Davidson v. Falconer*, 2 June 1827, v. S. 748, (N. E. 699); *supra* p. 332. It has been held, that a decree *in foro* cannot be reduced on the ground of *res noviter veniens*, *Gordon v. E. Galloway*, 20 Jan. 1631, M. 12,136;

but the decision is inconsistent with the opinion of Stair, iv. 1. 44, and Ersk. iv. 3. 3; and it seems to have been taken for granted, in the case of the *Magistrates of Dumbarton*, supra, that a decree *in foro* might be set aside on this ground; see also *E. of Aboynes and Lord Pittrichie, v. Laird of Gight*, 5 July 1676, i. Sup. 755, and *e contra* ii. Sup. 201.

SECT. III.—OF PARTIES APPEARING FOR THEIR INTEREST.

A party may sist himself as a defender in any action in which he can shew he has a proper legal interest. Thus, the representatives of a deceased defender may sist themselves in the action, though the pursuer does not wish to proceed; *M<sup>r</sup> Culloch v. Hannay, &c.*, 24 Nov. 1829, viii. S. 122. Where an action is raised against a party, who, if unsuccessful in his defence, will have a claim of relief against another, the last party may appear and defend the action. In the same way, where an action is raised to cut down the title of one's author, the person deriving right from him may appear and defend the title; *Bontine v. Dunlop*, 15 Jan. 1823, ii. S. 115, (N. E. 106). In actions raised by or against tenants, relating to their possessions, it often happens that the landlord has a greater interest in the question at issue than the tenant, and he is, therefore, entitled to sist himself; nor will the circumstance that the tenant has disclaimed the action, and a final interlocutor has been pronounced against him, prevent the landlord from appearing; *M. of Douglas, &c. v. E. of Dalhousie*, 15 Nov. 1811, F. C.; *Young v. Cunningham*, 22 June 1830, viii. S. 959. When during the dependence of a process, either party dies, or becomes bankrupt, his representative, or trustee, may sist himself, either as pursuer or defender, on producing his title; or if, in the case of bankruptcy, the other party wish it, the dependence of the action will be ordered to be intimated to the trustee; and, unless the bankrupt find caution for expenses, or the trus-



tee sist himself, he cannot, in the general case, proceed with the action; *Scott v. Fisher, &c.*, 27 May 1831, ix. S. 645; see *supra*, p. 170; *Hamilton v. M'Gilp and Shirra*, 15 Dec. 1826, v. S. 140, (N. E. 129). A cautioner in a suspension or advocacy, may also appear and sist himself, but not a cautioner in loosing arrestments on a dependence; see Lord Justice-Clerk's Speech in *Potter v. Bartholomew*, 17 Nov. 1847, x. D. 101. In actions of competition, such as multiplepointings, rankings and sale, &c., a party, though not cited, may appear and compete, and crave a preference; *Stair*, iv. 38, 21, and Apx. 844, Brodie's edit.; *Bank*. iv. 23. 21; but the Court were of opinion, in one case, that the omission to cite the real creditors in possession in a process of ranking and sale, could not be supplied by their appearing and sisting themselves; *Littlejohn v. Hamilton*, 7 Mar. 1829, vii. S. 563; see as to whether a party be entitled to appear in an adjudication, *Hall and Co. v. Barry*, 4 Mar. 1830, viii. S. 638. Parties have been allowed to appear after decree, and the extract has been allowed to go out in their names; *Morrison v. Hunter and Ross*, 5 Dec. 1822, ii. S. 68, (N. E. 62). This frequently occurs.

A party will not, however, be allowed to sist himself, even as a defender, unless he have a proper interest. Thus, the debtor in an action of mails and duties cannot object to decree passing against his tenants, who have not entered appearance; *Buchan v. Scott*, 20 Jan. 1829, vii. S. 296. An heritable creditor cannot appear in a process of adjudication in implement of subjects over which his security extends, nor can the common agent in a process of ranking and sale of the subjects appear in such an adjudication, for every creditor is entitled to secure every preference he can, all objections being reserved to the decree of adjudication, when obtained; *Hutchinson v. Cameron's Trs. and Wood*, 26 June 1830, viii. S. 982. One cannot appear and defend an

action raised against another, for payment of a sum contained in a document of debt, on the ground that he has the preferable right to the debt; *Stewart v. Stewart*, 20 Feb. 1829, vii. S. 440. In such cases, the party appearing has no interest to resist a decree. Proceedings to which he is not a party are *res inter alios actæ*; and, as they cannot hurt or affect his right, he has no interest to oppose them. It is the concern of the defender to see that he pays the debt to the proper party. To prevent collusion in actions of divorce, the creditors of the defender may appear and defend the action, but not after the pursuer has emitted the oath of calumny, and made out the ground of divorce, *Lothian*, 168; *Greenhill v. Ford*, 7 Feb. 1822, i. S. 296, (N. E. 275), *supra*, P. iii. 11. B. 3. They may also appear in other actions in which they are interested, and in which they are likely to be injured by the collusion of the parties; *Morrison v. Hunter and Ross*, 5 Dec. 1822, ii. S. 68, (N. E. 62). Hardly in any case can a party appear and sist himself as pursuer, without the defender's consent; *Magistrates of Edinburgh v. Budge and Co.*, 16 Dec. 1824, iii. S. 403, (N. E. 283); *Remington, Crawford, and Co., &c. v. Bruce, &c.*, 2 June 1829, vii. S. 692; *Taylor v. Crawford*, 14 Nov. 1833, xii. S. 39. But a landlord may appear to support his tenant's complaint; *Marquis of Douglas*, *supra*; *Young*, *supra*; and creditors may also appear to defeat attempts at collusion; *Morrison*, *supra*. A party who appears, and is sisted, will not be allowed to withdraw, without paying the expenses his appearance may have occasioned; *Irvine v. Commissary of Dunkel*, 17 June 1635, i. Sup. 91; and, in general, a party will not be allowed to withdraw from a process, if any injury is likely thereby to arise to any other party; *Stephenson's Trs. and Stephenson v. M. of Tweeddale*, 11 Mar. 1823, ii. S. 287, (N. E. 252). See *Livingstone v. Clason, &c.*, 1 Mar. 1845, vii. D. 554.

As to the effect of such appearance, it has been found, "that however a man's appearing for his interest may give ground for a decret of preference against him, yet where he is not called, *and no conclusion against him*, his appearing in the process is no sufficient foundation of a personal decerniture against him;" *Wedderburn v. Town of Dundee*, 4 Jan. 1740, M. 11,986; see, however, *Boyd v. Lang*, 20 Jan. 1832, x. S. 213. But he may be found liable in expenses, and any decree pronounced against him is a decree *in foro*.

The form of sisting a party in ordinary actions, is by enrolling the cause, and lodging a minute sisting him, and an interlocutor is then pronounced holding the party sisted.<sup>1</sup>

#### SECT. IV.—OF CITATION ON INCIDENT DILIGENCE.

The only case in which a diligence is used in modern practice, to bring new parties into the field, is in the process of ranking and sale; for, by A. S., 23 Nov. 1711, § 5, it is declared, "if the debtor, or any of the creditors defenders, compearing and producing, shall happen to die, the process thereupon shall stop no longer than till their apparent heir be cited to compear upon a diligence, without any necessity of waiting the year of deliberation, or transferring the process *passive* against him."

A diligence seems formerly to have been used where it was necessary to intimate the dependence of a process to one against whom the party had a claim of relief, as in actions for eviction of lands, in the case of principal and agent, cautioner and principal, landlord and tenant, superior and feuar;

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<sup>1</sup> "B. (surname of counsel) craved leave of the Lord Ordinary to sist C. D. as a party to this process." (Signed by Counsel.)

"In respect of the minute for C. D., of this date, holds the said C. D. duly sisted as a party to the process accordingly."

Bankt. iv. 25. 11. Now, however, this is done by an interlocutor ordering the cause to be intimated, without any diligence or extract, and a certificate of intimation is held sufficient evidence.

Where the interest of the party is more important, a regular citation on a supplementary summons must be given, "for no decree can go against a man called by incident;" *Lord Forbes v. E. of Kintore, and Others*, 18 Feb. 1747, M. 12,083. Such an appearance, "incidenter, or for one's interest, gives ground for a decree of preference, but is not the foundation of a personal decerniture against the party so appearing;" *New Form of Process*, (2d Ed. 1799), 73. On this account, no proper defenders can be called by a diligence, not even the heir of one of several defenders who has died during the process, *Lord Forbes*, *supra*; nor the tutors or curators of a minor; *Dalgleish v. Hamilton*, 26 June 1752, Kilk. 439, M. 2184. Ersk. i. 6, 21, seems to state that a diligence is sufficient to cite the husband of a woman who has married during the dependence of an action against her, but the usual and proper course is to raise a supplementary action.

SECT. V.—OF ALTERATIONS ON THE SUMMONS, AND  
AMENDMENT OF THE LIBEL.

We shall now consider how inaccuracies in the summons may be remedied. In the first place, this much is clear, that after the summons is signeted, the pursuer is not entitled extrajudicially, and by his own authority, to make any alteration. This was exemplified in *Tod and Wright v. Boyd*, 29 Nov. 1822, ii. S. 51, (N. E. 45), where an alteration to make the summons applicable to the son of the original defender (the latter having died before citation) was found fatal. An action of multipoleinding was dismissed as to certain objectors, nominal raisers, whose names were not inserted in

the libel till after the summons had been signeted and served on the common debtor and one of the nominal raisers, and who were farther called as the representatives of a deceased debtor, without calling the heir of that party; *Aitken, &c. v. Adamson, &c.*, 12 June 1838, xvi. S. 1135. A material alteration made on the summons, at any time during the action, without authority, will put an end to the process; *E. of Sutherland v. Dunbar*, 17 Dec. 1736, M. 12,154, Elch. Process, No. 8, and Notes. But where a summons, after being executed, had been in several places deleted, a duplicate compared with the original, by the clerks at the signet office, bearing the same date, and signeted by them, the stamp being torn from the first summons, was sustained, *Caddel v. Johnstone*, 3 July 1798, M. 12,010.

The simplest form of altering a summons is by a minute restricting the conclusions. This is necessary where a partial payment has been received after the execution of the summons, where it has been discovered that some of the defenders ought not to have been called, or that less is due than is concluded for. But a minute is an incompetent form of amending the summons, or of altering its conclusions; *Gifford, &c. v. Trail, &c.*, 8 July 1829, vii. S. 854; Lord President (Hope's) Speech, 862. A minute of restriction may be given in at any time.

The only other method of altering a summons, is by an amendment of the libel, which may be defined an addition or alteration upon the narrative, or conclusions of the summons. Without such an amendment, grounds of action not appearing in the summons cannot be admitted into the condescendence; *Dickie v. Gutzmer*, 27 Feb. 1828, vi. S. 637. These amendments have been known from the earliest periods of our practice, and many regulations are to be found regarding them in the acts of sederunt, most of which are now superseded. It has been already mentioned, (*supra*.

p. 319), that the Lord Ordinary, at the examination of the summons and defences previous to closing the record, may allow an amendment of the libel, or order defences more satisfactory and correct to be given in; and in such cases it is imperative upon him to award against the party who is in fault the expenses thereby incurred, 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 6; but it is only in cases where the summons is so defective as to render it necessary for the Lord Ordinary to order an amendment, that he *must* give expenses; *Rose v. McLeay and Horne*, 30 June 1827, v. S. 883, (N. E. 820). The amendment, in strictness, ought to be made in a separate writing, even where it consists merely of in the deletion of a few words, though in practice this is not always attended to,—and it can only be put into process by permission of the judge, on a motion from the bar. After being allowed to be seen by the opposite party, the Lord Ordinary, if no objections are made, pronounces an interlocutor, admitting it as a part of the summons. It has been found, that the objection that this interlocutor has been omitted cannot be listened to, if not made *tempestive*; *Elliot v. Sir J. Johnstone's Trs.*, 7 June 1821, i. S. 51, (N. E. 54; affirmed on appeal, 22 June, 1824; ii. S. App. 461.

No amendment of the libel can be allowed after the record is closed, 6 Geo. IV. c. 120, § 10; *Wilson v. D. of Queensberry's Exrs.*, 11 July 1826, iv. S. 830, (N. E. 837); *A. v. B.* 6 Mar. 1845, vii. D. 595; see *Baird's Trs.*, *ibid.* 1001; but provision is made for receiving new matter emerging, or *noviter veniens ad notitiam*, in the form of a condescendence; *Ibid.* (*supra*, p. 485). Amendments are allowed after the record is prepared, if not closed, on payment of such expenses as appear reasonable, or under reservation of all claims of expenses; *Inglis and Co. v. Lane and Co.*, 18 May 1831, ix. S. 599. In processes of reduction, “if the pursuer finds it necessary to add any farther reasons of reduction to those

contained in the libel, it shall be competent to him, before the record is made up, to state the same as an amendment of the libel ; but in that case, he shall furnish the opposite party with a copy of the amendment, forty-eight hours before it is given in to process, and pay such expenses as the Lord Ordinary shall think reasonable, and the defender shall give in defences applicable to said amendment"; A. S. 11 July 1828, § 51. See, as to expenses demandable, *Millar v. Mills and Vary*, 4 Feb. 1832, x. S. 295.

The extent of the variation on the libel which may be made by an amendment, is very considerable. A conclusion for payment of arrears of rent may be added to a summons of removing ; *Lady Wamphray v. Irving*, 18 Jan. 1693, iv. Sup. 49. A larger sum may be concluded for ; *Elliot*, supra. The plea of death-bed may be added to a summons of reduction on the head of forgery ; *Huttons v. Gibson*, 17 Jan. 1821, F. C. and 23 Mar. 1824, ii. S. App. 110. The title may be more clearly set forth ; *Cooper v. Allan*, 23 Nov. 1839, ii. D. 137, or a new title may be libelled ; *Sheriff of Teviotdale v. L. Cranston*, 24 Mar. 1630, i. Sup. 179 ; but see *M'Indoe, &c. v. Lyon, &c.*, 7 Dec. 1826, v. S. 92, (N. E. 85). A statute not originally libelled upon may be introduced ; *Munro v. Munro or Ross*, 31 Jan. 1845, vii. D. 358 ; and the pursuer may add to his libel the only points on which he insists, *L. of Meldrum v. Feuars of Meldrum*, 28 July 1716, M. 12,152, (reduction improbation by superior), or alter his libel in conformity with the documents on which he founds. (But see *Gilchrist*, infra). A summons of reduction of an entail so framed as to cut away the whole right of the debtor, in the lands under the entail, was allowed to be amended, so as to conclude for the setting aside of the entail only in a question with creditors, leaving it unaffected in a question *inter heredes* ; *Scottish Union Insur. Co. and Hamilton v. Bon-tine, &c.*, 30 June 1838, xvi. S. 1241. But, speaking general-

ly, an amendment which changes the basis of the action cannot be admitted; *Gilchrist v. Anderson*, 17 Nov. 1838, i. D. 37; *Scott v. Curle and Erskine*, 18 Jan. 1840, ii. D. 348: Aff. 8 June 1841, ii. Rob. 317, although the specialties of each case must be considered in dealing with this point of form; *Munro or Ross v. Hay Mackenzie and Munro*, 27 May 1836, xiv. S. 845; *Munro or Ross v. Paul*, 9 Mar. 1837, xv. S. 780: Aff. 3 Aug. 1840, i. Rob. 246; *Milne v. Mills*, 8 Mar. 1844, vi. D. 986; *Cox v. Tait, &c.*, 21 Jan. 1842, iv. D. 424; In *Trinity House of Leith v. Magistrates of Edinburgh, &c.*, 6 Feb. 1829, vii. S. 374, the question will be found considered whether an amendment of a summons, to the effect of admitting new pursuers, be competent. A second amendment of a libel is incompetent; *Graham v. Anderson*, 12 Dec. 1837, xvi. S. 212.

In some cases no amendment of the libel can be allowed. Thus, if the defender does not appear, the pursuer may restrict his conclusions, but he cannot amend. The reason is obvious: the defender may be willing to allow decree to pass against him as libelled, but it is impossible, in his absence, to allow the libel to be altered, except to the effect of limiting the demand. The only remedy is a supplementary action; *New Form of Process*, (2d Ed. 1799), 68. *Infra*, next section.

In proper criminal proceedings, alterations on the libel are very jealously guarded, ii. Hume, 274, (3d Ed. 280); Bell's Sup. 232; and the same rule holds in similar proceedings in the Court of Session, as in cases of forgery, or fraudulent bankruptcy, even where the other party consents; *Macdonell v. Camerons*, 12 June 1824, iii. S. 131, (N. E. 88). In actions for usury, it was once found that the libel might be amended; *Nisbet and Buchan v. Cullen*, 1 Feb. 1811, F. C.; but, in the subsequent case between the same parties, 29 May 1816, F. C., it was found incompetent to change the character of pursuer from that of trustee to an individual;



and as the action of usury is limited to twelve months from the date of the usurious taking, by the general limitation of suits upon penal statutes, 31 Eliz. c. 5, (1589), (held as incorporated in 12 Anne, Sess. 2, c. 16, (1713), *Surtees v. Allan*, 6 April 1814, ii. Dow. 154), no amendment can be received after the twelve months; *Paul v. Inglis and Co.*, 20 Jan. 1824, ii. S. 628, (N. E. 533). On the same principle, in petitions and complaints against the decision of freeholders, under the old system, no amendment could be admitted after four months from the date of the decision; *Speirs v. Campbell*, 3 Mar. 1826, iv. S. 524, (N. E. 532); and where a police statute provided that action should not "be competent after three calendar months, from the time the act is committed," it was held that the libel could not be amended, after the lapse of the three months; *Mitchell v. Stuart and Thomson*, 1 Feb. 1838, xvi. S. 409. In a petition and complaint under the former bankrupt act, it was held that an omission to refer to the proper sections of the statute could not be supplied, by an additional petition, but that a new complaint was required; *Megget v. Fairley*, 1 Mar. 1823, ii. S. 261, (N. E. 232). The same rule holds generally in summary applications, no amendment being allowed, at least if any procedure has taken place on them; *Kirkland and Sharp v. Wilson*, 20 Dec. 1831, x. S. 167. An error in the date of letters of suspension was found to be fatal; and, as the letters were held to be null, the objection could not be got over by the plea of personal exception, and the Court would not authorize a correction of the date of the signet letters; *Campbell v. Fotheringham*, 28 June 1826, iv. S. 766, (N. E. 774). It would appear, from the above case of *Campbell*, that wherever the summons is null, it cannot be amended; and the same inference may be drawn from an old case; *E. of Lauderdale v. Lord Yester*, 10 Nov. and 13 Dec. 1709, M. 12,062 and 12,151, and from *Syme v. Steel*, 10 Aug. 1765, M. 14,979, where an amendment of

the libel, to the effect of adding the concurrence of the Lord Advocate to a penal prosecution, was refused. Where a charge on the decree of an inferior court was turned into a libel, no amendment was allowed to be made, on the ground that the decree being the libel, and the record of the inferior court, it could not be amended; *Begbie v. Anderson*, 12 Jan. 1743, M. 11,988; *Watson v. Still*, 8 July 1779; Tait's MS. "Procedure when both parties present."

#### SECT. VI.—SUPPLEMENTARY SUMMONSES.

Supplementary summonses are often necessary, where all parties interested have not been called,—where the summons requires amendment, and the defender has not appeared, &c. &c. It is not easy to lay down a precise rule as to when a supplementary action is competent, but it would appear to be inadmissible where the original summons is null; *M'Indoe v. Lyon, &c.*, 7 Dec. 1826, v. S. 92; (N. E. 85.) See *Stewart v. Stirling*, 21 June 1836, xiv. S. 989; *Wood v. Dalrymple*, 4 Dec. 1823, ii. S. 555, (N. E. 480). It may be used, however, to bring forward additional grounds of action, *Scott v. Wilson*, 2 July 1822, i. S. 535, the conclusions of both summonses being the same. Thus, in an action of damages for slander, it was held competent to set forth prior and additional instances to those mentioned in the original summons, which in the original summons had been referred to generally in proof of malice; but statements inconsistent with the former cannot be permitted; *M'Dougall v. Campbell*, 25 Feb. 1829, vii. S. 460; it is allowable to state the facts more fully in the supplementary summons than in the original summons, and to libel new reasons not inconsistent with the former;—the conclusions in both being the same. *Scott v. Napier, &c.*, 29 Jan. 1829, vii. S. 338; *Cargill v. Baxter*, 28 Nov. 1826, v. S. 48, (N. E. 44); and a pursuer of a reduction, on the head of fraud, was allowed to bring forward, in a supplementary summons, a conclusion

of declarator of trust; *Howatson v. Murdoch*, 3 Mar. 1831, ix. S. 534. When the time limited for bringing an action has elapsed, defects in it cannot be remedied by a supplementary action; *Paul v. Inglis and Co.*, 20 Jan. 1824, ii. S. 626, (N. E. 533). A supplementary summons having reference to a transaction falling under the act, 1696, but not libelling on the act, nor containing reductive conclusions, is inept; *Blinchow's Trustee v. Allan and Co.*, 22 Jan. 1831, ix. S. 317; W. and S. vii. 26. A supplementary summons must be brought forward in due time, for conjunction with the former action will not be allowed, at a late period; *Dunn or Mason v. Merry*, 22 May 1832, x. S. 555. After the record had been closed in an action concluding for a principal sum, but not for interest, a supplementary summons concluding for interest was raised and allowed to be conjoined by the Court of Session, but it was held incompetent by the House of Lords, and ordered to be dismissed; *Edinburgh and Glasgow Canal Co. v. Sir T. G. Carmichael*, 27 May 1842, i. Bell, App. 316. See *Blinchow's Trustee v. Allan and Co.*, *supra*; and *supra*, p. 495.

#### SECT. VII.—OF REMITTING AND CONJOINING PROCESSES

##### OB CONTINGENTIAM.

Where there are two or more processes in court relating to the same matter, or having a connection or contingency therewith, so that the circumstances of the one action are likely to throw light on the other, all the processes must be remitted *ob contingentiam* to that process which has come first into court, or which stands first in the roll; and it is immaterial whether the leading process be depending in the same division or not; 48 Geo. III. c. 151, (4 July 1808), § 9. If both cases come into court the same week, the cause enrolled before the senior Lord Ordinary shall be deemed the first or leading process, and the other cases shall be remitted to his Lordship, and shall belong to the same division, as the said leading cause; if cases having a contingency are enrolled the

same week before the same Lord Ordinary, and marked for different divisions, his Lordship shall determine to which division they shall belong, and his judgment shall be final; A. S. 24 Dec. 1838, (*Enrolment of New Causes, &c.*), § 6; see *Currie v. Glens*, 30 May 1845. To warrant a remit *ob contingentiam*, there must be a depending action to which the other process is remitted; for it is not a ground for a remit that the process has a connection with a cause formerly depending; *Gibson v. Stewart*, 15 June 1827, v. S. 803, (N. E. 473), *Hamilton v. Hamilton, &c.* 27 Feb. 1830, viii. S. 607. The remit is in general made on a simple motion. The effect of this remit is merely to bring both processes before the same Lord Ordinary, or the same division of the Inner house. They remain in all respects distinct processes till they are conjoined, and formerly they might have had different clerks—they are enrolled under separate names—have separate pleadings, and no step taken in one will prevent the other falling asleep. Where two processes already depend before the same Ordinary, or the same division of the Inner house, it is unnecessary to enrol them to get a remit *ob contingentiam*, as the whole object the remit can accomplish is already attained. Previously to the Lords Ordinary being equally attached to both divisions, one division could not remit to an Ordinary of the other; they remitted to the other division, who remitted to the Ordinary; or they remitted to their own Ordinary, who remitted *ob contingentiam*. There is no such contingency between an action at the instance of an agent for payment of his business account and the suit still depending in the previous stages of which the account was incurred, as to warrant a remit thereto; *Landale v. Roughead or Tod*, 13 Jan. 1831, ix. S. 268. But there is contingency between a process of sequestration advocated in a question of expenses, and an action of damages in the Court of Session for wrongous sequestration, *Cochrane v. Hamilton*, 3 Mar. 1847, ix. D. 794.

When processes have been thus remitted *ob contingentiam*, or already depend before the same judge, and their connection is so intimate that they ought to be conducted as one process, they may be conjoined. To accomplish this conjunction both processes must be awake, and in the roll, or at *avizandum* together. Thus, a case depending before the junior Lord Ordinary in the Bill-Chamber cannot be conjoined with one depending before him in the Outer house. If it be a suspension, it must be called and enrolled in the usual way. If it be an advocacy, it must not only be called and enrolled, but there must be an interlocutor advocating the cause from the inferior judge, before any conjunction with another process. If the process with which it is to be conjoined be in the Inner house, great *avizandum* must be made. The effect of the conjunction is to make the two processes one; and the clerk to the leading process now becomes clerk to both. The warning given by our older writers on forms, (e. g. *New Form of Process*, 2d Ed. 1799, 83), against allowing the conjunction of processes without due consideration, as all the extracts of acts and decrees to be subsequently pronounced will be burdened with the libel, productions and pleadings in both actions, is now less applicable, from the great improvements introduced in the extracting department, *supra*, p. 113.

Where, in special circumstances, a record in the first process had been closed, before a supplementary action calling new parties had been brought into court, these parties were not allowed to object to the conjunction, on the ground that they had not been parties to the making up of the record in the first action,—but in this case, the facts and pleas stated in defence, were the same in substance; *Thomson v. Gilkison, &c.*, 18 Nov. 1830, ix. S. 27. Conjunction will not in general be allowed, unless the second action has been brought in *due time*; *Dunn or Mason v. Merry*, 22 May 1832, x. S. 555. A record being closed in one process, the Court conjoined it

with a relative one advocated *ob contingentiam*, in which no record had been prepared, and allowed a record to be made up therein; *Shand v. Shand*, 28 Feb. 1832, x. S. 384. A party brought an action of count and reckoning and payment, and the defender raised an action of relief against other parties; it was held incompetent to conjoin the processes, to the effect of rendering the conjoined process an action of accounting between the pursuer of the original action and the defender in that of relief; *Gray v. Kerr, &c.*, 7 Feb. 1837, xv. S. 494.

Conjoined processes may be again disjoined, where that appears necessary; Bev. 601.

#### SECT. VIII.—OF REPEATING A SUMMONS INCIDENTER.

In order to enable a defender to maintain a defence, it is often necessary that he plead it by way of action. We have elsewhere (*infra*, P. iv. 8. 14), considered the cases in which actions of reduction require to be repeated. When a libel can be repeated incidenter, instead of raising and executing a new action, enrolling it, and getting it remitted *ob contingentiam*, to the former process, a signeted summons is merely produced, and then an interlocutor may be pronounced holding it repeated; and it may either be conjoined or not with the former action. A third party cannot, of course, appear in a depending action as pursuer, and get a separate action at his instance repeated; *Remington, Crawford and Co. &c. v. Bruce*, 2 June 1829, vii. S. 692, *supra*, p. 491. It has been stated that a process cannot in any case be repeated without the consent of the other party, Ivory ii. 616; Bev. 600, and see *infra*, P. iv. 8. 14. In the older cases in which actions are stated to have been repeated, no notice is taken of such consent, and see *Bridges, &c. v. Elder &c.*, 5 Mar. 1822, i. S. 417, (N. E. 351). A summons thus repeated operates merely as a defence against the original action. If it be intended to have a farther effect, the regu-

lar forms must be gone through; *Weir v. White*, 24 Feb. 1747, M. 4034. "In general, a summons repeated *incidenter*, has no farther effect than the libel in the process into which it is repeated;" *New Form of Process*, (2d Ed. 1799), 85.

SECT. IX.—OF PROCEEDINGS IN AN ACTION WHERE THE  
DEFENDER HAS FOUND CAUTION JUDICIO SISTI.

Applications for warrants to arrest debtors as in *meditatione fugæ* are almost always made to sheriffs, or other inferior judges; and, where the application is well founded, warrant is granted to incarcerate the debtor, till he find caution to sist himself at the bar of any competent court in Scotland, in any action to be brought against him at the instance of the applicant, within the space of six months from the date of the bond of caution. In maritime cases, caution not only *judicio sisti*, but *judicatum solvi*, may be exacted; see *supra*, p. 415. Where the ground of debt is a bond of annuity, caution may be required not only for what is due, but for payment of the future annuities; *Cameron or M'Neill v. Stewart*, 18 Nov. 1823, ii. S. 498, (N. E. 439). If the debtor find caution, the bond commonly appoints a domicile at which the debtor may be cited, whether he be within Scotland or not; *Horne v. Smith and Dunbar*, 18 Nov. 1823, ii. S. 500, (N. E. 441). Care must be taken that the summons is duly executed within the six months; for if it be not, or if it be dismissed for any informality, the caution will almost to a certainty be lost; *Horne*, *supra*. There is, of course, nothing peculiar in the management of the action, until decree is about to be pronounced. Before craving decree, whether in absence or *in foro*, the pursuer should require the cautioner to sist the defender at the bar, and have a day appointed for that purpose. An order will accordingly be pronounced, under certification, that if he fail, the bond of caution will be declared forfeited, and the order will be

appointed to be intimated to the cautioner. If the debtor do not appear, decree will be pronounced against him, and, at the same time, against the cautioner for the sums found due. If he do appear, the pursuer ought to have a minute ready, demanding a warrant from the Lord Ordinary or Court to incarcerate the defender until decree can be extracted, and diligence executed. A duplicate should also be prepared, that while one copy remains in process, the other may be delivered to the macer or messenger as his warrant for the incarceration.

Though this is the usual course of proceeding, there is no danger in taking decree, as the cautioner is bound till the decree be extracted; *Alexander and Baird v. Ford, &c.*, 29 Nov. 1823, ii. S. 541, (N. E. 472). The pursuer is therefore entitled, even long after the decree is final, to require the cautioner to sist the defender in court; *Stewart v. Fraser*, 8 July 1809, F. C. If the cautioner be desirous of getting free of his obligation, he may, at any time, either before or after decree, enrol the cause, and intimate that, on a specified day, he will produce the defender, and crave to be absolved from the cautionary; *Stevenson, &c. v. Chisholm, &c.* 11 Mar. 1812, F. C. The cautioner must produce the defender in the same situation as he was at the date of the original apprehension, that is to say, without a personal protection, *Cowan v. Aitchison and Walker*, 28 Nov. 1797, M. 2061; *Harding v. Turnbull*, Feb. 1797, Hume, 402. It was held no defence to a cautioner, when required to produce the defender, that he was in the sanctuary, as the Court granted warrant to bring him out of the sanctuary, and would not protect him from the pursuer's diligence; *Tasker v. Mercer*, 27 Feb. 1802, M. Apx. *Cautio jud. sisti*, No. 2; More, cxi. But in *Douglas Brothers and Co. v. Wallace and Co. &c.*, 17 Dec. 1842, v. D. 338, it was decided that the cautioner was bound to produce the person of the debtor



who had retired to the sanctuary, at all diets of Court, when required ; failing which, he would be liable to the same extent as the principal debtor, and the Court refused to grant a special warrant to bring the debtor from the sanctuary, on the day appointed. The cautioner having produced the debtor at the bar, as required by the Court, it was held competent to grant warrant of incarceration of new, without fresh proof of the debtor being in *meditatione fugæ* ; *ibid.*

Although caution *de judicio sisti* have not been found at the outset of the process, if the pursuer apprehend there is danger of the defender leaving the country during its dependence, he may apply to the Lord Ordinary by minute, setting forth the grounds of his belief, and praying for warrant to apprehend and examine the defender, and thereafter to incarcerate him till he find caution *de judicio sisti*. The same procedure has also been adopted, after decree was pronounced.

Upon the defender being sisted in court, when decree is about to be pronounced, he may avoid incarceration, by finding caution not to leave the country, but to abide the diligence of the law, for such time as may be necessary to extract the decree, and put personal diligence in force. The cautioner may be bound to present him at a certain place when required, on due notice. The creditor is not entitled to insist for caution *judicatum solvi*, *Cockburn and Attorney v. Inglis*, 28 Feb. 1776, M. Apx. *Cautio jud. sisti*, No. 1., except in maritime causes ; *supra*, p. 504.

It is now quite settled, that when caution has been found *de judicio sisti*, in an action in an inferior court, the cautioner continues bound, though it be removed into a superior court, by advocation, reduction, or appeal ; *Myles v. Lyall*, 1 Dec. 1797, M. 2063, &c. But if the pursuer extract his decree, without requiring the defender to be sisted, the cautioner is free ; *Telfer v. Muir, &c.*, 15 Dec. 1774, M. 2054.

Though the cautioner fail to produce the debtor at the first diet assigned in the process against him, yet if he produce him in the course of that process, this will be sufficient implement of the bond of caution; *Muir v. Loudon and Harrison*, 28 Nov. 1810, referred to in *M'Callum v. M'Callum*, 18 Feb. 1803: Hume, 405. A cautioner having failed to produce the debtor in the action against the latter, and being sued for the debt in consequence, was found entitled to present the debtor, even after decree had passed against him, the cautioner always paying the expenses incurred in consequence of his previous failure to produce; *Ross v. Muat*, 24 June 1800; *Ibid.* See *Fell v. Lyon*, 16 Feb. 1830, viii. S. 543.

#### SECT. X.—OF LODGING PAPERS, &c.

The rules relating to the lodging of defences and condempnations and answers, have been already noticed, *supra*, p. 284, 327, as well as those regarding cases, p. 339. The regulations concerning the preorting proofs, have also been mentioned, p. 359. There are still, however, some rules applicable to the lodging of all papers. The act of sederunt, 11 July 1828, § 109, enacts, "That in all interlocutors, either of the Lord Ordinary or of the Court, ordering or allowing papers from both or either of the parties, a time shall be fixed for giving in the same, with due regard always to the nature and circumstances of the case; which time may be prorogated; provided, before the elapse thereof, special application, by note or otherwise, shall be made for such prorogation; and no prorogation shall, in any instance, be granted, except on cause shewn, nor oftener than once." When papers are ordered by the box-day, an application for prorogation cannot be made by a motion to the Ordinary; but it was, in one case, allowed to be done, by lodging a note, *Minto, &c. v. Kirkpatrick*, 23 Dec. 1831, x. S. 190. § 111 enacts, "That the time limited for giving in papers,

other than reclaiming notes, may, at any stage of the proceedings, be prorogated, without the necessity of any application to the Court or Lord Ordinary, if both parties consent; provided that such consent be given in writing, under the signature of the respective agents, and a copy of such prorogation, by consent, shall be prefixed to the paper when given in, as well as of the interlocutor, ordering or allowing the same to be given in; and that a prorogation, granted on the motion of one party, shall not preclude a prorogation, on the motion of the other party." But by A. S. 19 Nov. 1829, this regulation is restricted to papers ordered by the Lords Ordinary in the Outer house during session, and by the Lord Ordinary on the Bills, acting under authority of the bankrupt statute, during vacation; and it is enacted, that the time for lodging papers in the Inner house, cannot be prorogated of consent. In applying for a prorogation, it is sufficient if the case be enrolled before the expiry of the term allowed, though the time be elapsed before the motion be made, *Masson v. Masson*, 19 June 1829, vii. S. 771. By § 114 of A. S. 11 July 1828, papers falling due on a Saturday, may be lodged on a Monday, unless, 1. The Court rise for the vacation, or Christmas recess, on Saturday. 2. Unless the paper be a reclaiming note, or note to be reponed, or a paper falling to be lodged in the Bill-Chamber; or, 3. Unless the paper have been peremptorily or specially ordered to be lodged on Saturday.

Some farther regulations about papers may be noticed in this place. By the above act of sederunt, § 110, "every paper given in to process in the Inner or Outer house, in terms of an interlocutor, ordering or allowing the same to be given in, and also every reclaiming note, and every note craving to repon the petitioner, which, by act of sederunt, is required to be presented within the reclaiming days, shall have prefixed thereto a full copy (including the date) of the

interlocutor ordering or allowing such paper, or of the interlocutor complained of, as the case may be; and which interlocutor need not be repeated in the body of the paper; and shall also have prefixed, in like manner, a copy of any interlocutor prorogating the time originally allowed." A copy of any prorogation by consent, must also be prefixed; § 111, *supra*.

"The clerks shall not receive into process any paper requiring the signature of counsel, without such signature; and, before marking any paper as lodged, they shall examine the said copy of the interlocutor or interlocutors, and prorogation by consent, (where such has been given), above ordered to be prefixed; and shall not, in any instance, receive and mark any paper after the lapse of the day on which it is receivable; and if any paper shall, through error, or incorrect or insufficient information, be received, and marked by the clerk, after the time within which it is receivable, it shall be ordered to be withdrawn from the process; provided always, that when a note is given in within the reclaiming days, praying to be reponed against an interlocutor of a Lord Ordinary, pronounced on failure duly to lodge a paper ordered, or allowed to be given within a limited time, the Inner house clerk shall not receive such note, unless accompanied with the paper ordered;" § 112.

"The clerks in the Inner or Outer house, or their assistants, shall mark the true date of lodgment on every paper given into process, except such as they are herein before prohibited to mark as lodged;" § 113.

In particular cases, the papers are required to be signed by a party himself, as well as by his counsel, *Fergusson, &c. v. Steavenson, &c.*, 26 Jan. 1830, viii. S. 390. Articles approbatory and improbatory, must be signed by the parties. *Infra*, P. iv. 8. 12.

The name of the agent of the party for whom papers and documents of every description are given into process, must appear, under a penalty of 20s.; A. S. 11 Mar. 1772; A. S. 13. Feb. 1787.

SECT. XI.—OF REPORTING INCIDENTAL MATTER TO THE COURT, AND PROVISION FOR DIFFICULTIES IN THE FORMS OF PROCESS.

“The Lord Ordinary may, after intimation to the parties, report verbally to the Inner house any incidental matter which may arise in the course of the cause, and such matter so reported by the Lord Ordinary shall be disposed of upon argument by counsel, unless the Court shall, when the matter comes before them, think fit to order cases; and if judgment shall be pronounced by the Court, or an order shall be made in respect of the matter so reported, that judgment or order shall be final, and the Court shall either settle the expense relative to the part so reported, or reserve the consideration thereof until the end of the cause;” 6 Geo. IV. c. 120, (*Judic. Act*, 5 July 1825), § 19.

The intimation “shall be made by interlocutor pointing out the incidental matter so to be reported;” A. S. 11 July 1828, § 66. When matters are thus reported incidentally, the interlocutor is pronounced by the Lord Ordinary, and not by the Court, *M'Dougall v. Campbell*, 25 Feb. 1829, vii. S. 460; and consequently it is competent to reclaim against the judgment; *Sands v. Meffan, &c.*, 20 Jan. 1829, vii. S. 290.

“The above A. S. farther provides, § 119, that if any difficulty shall occur with regard to the proceedings under the herein described form of process in the Outer house or Bill Chamber, the Lord Ordinary may report the same verbally to the division to which the cause belongs, who may direct him how to proceed, or report to the other division, if they see cause; and in case of any difficulty occurring in either

division, the Lord President shall forthwith assemble a quorum of the Court, to whom the same shall be orally stated, and the Court shall give instructions how to proceed in the particular case, and if necessary, shall make an act of sederunt for the regulation of such cases in future."

SECT. XII.—REGULATIONS TO BE OBSERVED BY THE CLERKS  
OF COURT, BY A. S. 11 JULY 1828—&c.

The Act of Sederunt, 11 July 1828, introduces some new regulations to be observed by the clerks. § 68 enacts, "that when a process, after having been at avizandum before the Lord Ordinary, is re-transmitted, the clerk of court shall send notice thereof by billets by post to the agents of the parties."

"The summons, or letters of advocation or suspension, petition or complaint, or other writ by which a process is commenced, together with the executions of service or citation thereon, shall remain constantly in the hands of the clerk of process, subject to inspection by any party interested, and shall, on no account, be lent up; but a copy of such writ, either printed or in manuscript, certified as correct by the agent giving it in, shall be lodged along with the principal, in order to be lent up when required; saving and excepting always in the special cases following:—viz. 1st, In the case of a defender, respondent, or charger, entering appearance, the writings being in such cases returnable in terms of § 32, (*supra*, p. 284); 2dly, In the case of a pursuer, advocator, or suspender, for the purpose of enrolment; 3dly, In the case of a party intending to apply for letters of inhibition or arrestment on the dependence of a process; and, 4thly, In the case of a petition for sequestration required to be borrowed for the purpose of registration, (now inapplicable): AND FURTHER, in order to prevent as far as possible the detri-

ment to the record and danger to litigants, in consequence of the practice of allowing the proceedings before the Court to remain, during a long period, out of the custody of the public officers," provision is then made for forcing back to the clerks the writings borrowed. § 104. This is ordered to be done by the ordinary compulsitor of Caption, *i. e.* a warrant of incarceration of the agent and his clerk who borrowed the writings granted by the Lord Ordinary on the Bills, on the application of the depute clerk of Court. Little attention has in practice been paid to this regulation. The Court have occasionally admonished the clerks to attend to the first part of this enactment prohibiting the lending up of the original writs; 29 Nov. 1828, vii. S. 83.

"For the better preservation of the interlocutors of the Lords Ordinary and of the Court, in order to afford the agents and lieges generally more convenient and prompt access thereto, at all times," it is enacted that "the interlocutors and notes of the several Lords Ordinary and of the Court, shall be engrossed by the clerks on a separate paper, with which view pursuers or other parties taking the lead in enrolment, shall, along with their summons, note of advocacy, or other writ, as the case may be, lodge with the clerks two sheets of the same size and form with that generally used at present for the record copies of printed papers, which shall be stitched within proper covers of cartridge paper, and form a separate step of each process, to be denominated "Interlocutors of Court," the assistant clerks providing such farther sheets as may be necessary to be added thereto, in the course of the process: And in cases of advocacy or suspension which have come into court through the Bill-Chamber, the agent taking the lead shall engross the interlocutors and notes, if any, of the Lord Ordinary in the Bill-Chamber on the said sheets, when he lodges these with the clerk." And it is farther "expressly declared that

the said interlocutors of court shall not be lent out by the clerk, but shall be kept by him, along with the summons or other steps declared to be so preserved, and shall be brought to court at each calling of the cause, and transmitted to the judge when avizandum is made, and shall be patent to agents and parties, on all occasions, and the clerks shall be bound to give copies, when required, of all of the said interlocutors or notes."

SECT. XIII.—OF THE POOR'S ROLL.<sup>1</sup> .

The A. S. 21 Dec. 1842, contains a code of regulations on the subject of suing *in forma pauperis*. We shall notice them in their order, with the decisions of the Court upon the different points of this department of our forms of process.

The A. S. proceeds upon the preamble, "Whereas, by the 45th act of the second Parliament of James I. in the year 1424, a provision is made for appointing advocates to assist indigent persons who cannot afford the expense of prosecuting their just claims in courts of law ;<sup>2</sup> and whereas acts of sederunt concerning the poor's roll were passed on 20th November 1686, 9th June 1710, 16th June 1742, 10th Au-

<sup>1</sup> The application for the benefit of the Poor's Roll is an Inner house proceeding, but as it is generally made with reference to litigation in the Outer house, the subject may be conveniently noticed here among other incidental matters.

<sup>2</sup> Mar. 1424, c. 24, (Th. Ed. ii. 8.) The quaint words of this old statute have often been quoted. "And gif thar be ony pure creature, that for defalt of cunnyng or dispense, can not or may not folow his cause, the King, for the lufe of God, sall ordane that the judge before quham the cause suld be determynt, purvay and get a lele and a wyse advocate, to folow sic pure creature's cause. And gif sic cause be obtenyt, the wrangar shall assyth bath the party scathit, and the advocate's costis and travele."



gust 1784, 11th July 1800, and 16th June 1819;<sup>1</sup> and whereas there is reason to believe that many persons have been admitted to the benefit of the poor's roll who are not proper objects for it, and who have otherwise obtained undue advantage over their adversaries; and it is therefore expedient that provisions should be made to correct these and certain other abuses which are believed to exist:—

And whereas, in order to secure, at the smallest expense, the benefit of the poor's roll to those who really deserve it; and at the same time to regulate the mode of recovering and accounting for the dues of court and professional charges, where the adverse party shall be found liable in expenses, it is necessary to make the following regulations:—"—

Therefore the Lords ordain:—

§ 1. That the faculty of advocates, the writers to the signet, and solicitors before the Supreme Courts, besides electing counsel and agents for conducting the causes of the poor as at present,<sup>2</sup> shall also respectively name two advocates, one writer to the signet, and one solicitor each year, to act exclusively as reporters on the *probabilis causa* of the pauper applicants for the benefit of the poor's roll. The lists to be furnished to the Senior Principal Clerk of Session of each division of the court; as also to the keeper of the minute-book, in order to be printed and published on the meeting of the

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<sup>1</sup> To these may be added A. S. 2 Mar. 1534; and A. S. 27 April 1535.

<sup>2</sup> By A. S. 10 Aug. 1784, § 1, A. S. 11 July 1800, and A. S. 16 June 1819, § 1, the faculty of advocates shall appoint six of their number annually to be advocates for the poor, and the writers to the signet, and also the agents or solicitors, shall each nominate, in the month of December annually, four of their number respectively, to be writers and agents for the poor, and shall, immediately after such nomination, give in to the senior Clerk of each Division, a list of the persons so appointed; which list is to be entered in the books of sederunt.

court in January yearly, and headed "List of Lawyers and Agents for the Poor, 1843," and so on yearly.

§§ 2, 3. "No person shall be entitled to the benefit of the poor's roll, unless he shall produce a certificate under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances according to a formula hereto annexed."<sup>1</sup> "If the

<sup>1</sup> "Formula for the use of the Clergy in framing Certificates of Poverty.

We, the undersigned, Minister and Elders of the Parish of \_\_\_\_\_ do hereby certify, that on the \_\_\_\_\_ day of \_\_\_\_\_ A. B., residing at \_\_\_\_\_ applying for the benefit of the Poor's Roll to enable him [or her] to carry on a law-suit about to be brought [or presently depending] before the Court of Session, appeared personally before us, and did in our presence [*if the adverse party or his Agent be present, add, and in presence of C. D., designing him*] emit the following statement in regard to his [or her] circumstances and situation.

That he [or she] is \_\_\_\_\_ years of age.

That he [or she] is unmarried [or married as the case may be.] That he [or she] has \_\_\_\_\_ number of children under such an age, or in such or such circumstances.

That he [or she] has resided in this parish [*specify the time.*]

That he [or she] is possessed of such and such property [*here specify particularly the applicant's property of every description.*]

That he [or she] is [*state the trade or occupation*] in which his [or her] earnings amount to so much.

That he [or she] has or has not at present any other law-suit depending before this or any other court, [*or if the applicant has any other law-suit, the case should be particularly mentioned.*]

*To be signed by the Minister and two Elders.*

N.B.—The minister and elders will then add whether the whole or any, and what part of the foregoing statement is consistent with their own proper knowledge, or with the proper knowledge of any one of them, or whether it is verified by persons known to them, or whether its credit is to depend entirely on the statement of the applicant, and whether he or she is of good character and worthy of credit, or, if the case admit of it, they may add any other *causa scientiæ* that may occur to them."—Schedule A.

party's health admits of it, he or she shall appear personally before the minister and elders, at the time and place to be appointed by them, to be examined, as to the facts required by said formula; and the minister and elders shall then certify how far the statement given by the party consists with their own proper knowledge, or that of any one of them, or whether its credit rests on the information of others, or solely on the statement of the applicant, in which latter case they shall certify whether he or she be of good character, and worthy of credit."

In *Smith, Petr.*, 8 July 1834, xii. S. 890, it was observed that it is entirely out of the sphere of the kirk-session to take into consideration the merits of the action, in reference to which the applicant requires the benefit of the poor's roll. A party belonging to a parish in the country came to Edinburgh, with a view of getting the benefit of the poor's roll, in an action about to be instituted by him, and he emitted the usual declaration before the kirk-session of one of the parishes of Edinburgh; the Court refused to entertain his application, till he should make the necessary declaration before the kirk-session of his own parish, *Paterson v. M'Kenzie*, 15 June 1830, viii. S. 920. A clergyman having refused to grant the usual certificates required by the former act of sederunt, 16 June 1819, the Court remitted to the sheriff to inquire and report, *Rattray*, 8 July 1824, iii. S. 232, (N. E. 163). On the refusal of a kirk-session to grant the certificates to obtain admission to the poor's roll, the Court remitted to the sheriff of the county to enquire and report; *Thomson*, 21 Jan. 1829, vii. S. 301. In an application for the benefit of the poor's roll, in an action against the kirk-session of the applicant's parish, a remit was made to the sheriff-substitute of the county to receive the declaration, and report, —, 20 Jan. 1831, ix. S. 308. Where there were no elders in a parish, and a certificate could not be procured by an appli-

cant for the poor's roll, in terms of the act of sederunt, which requires such certificate to be signed by the minister and two elders, the Court remitted to the sheriff to take the applicant's declaration; *A. B.* 30 June 1836, xiv. S. 1040. Where a kirk-session obstinately refuse to take the declaration of an applicant for the poor's roll, in terms of the act of sederunt, and thereby occasion unusual delay and expense to the pauper, the Court will subject them in expenses to him; *Morris v. Greig*, 10 July 1835, xiii. S. 1092. It was held that the certificate of poverty granted by the minister and elders need not be given in kirk-session, and that, in the circumstances, a certificate, subscribed on one paper by the minister, and on another by the elders, was sufficient; *Morren v. Murray*, 18 Jan. 1842, iv. D. 396. The certificate of the minister and elders of a Dissenting congregation is not sufficient to support an application for the poor's roll, but must be attested by the minister and elders of the parish; *Elphinstone*, 11 Feb. 1836, xiv. S. 463. Where parties have acted, for a tract of years, as elders, and, in that character, signed a certificate (along with the parish clergyman) of an applicant for the poor's roll, the Court will not refuse to remit the case to the counsel for the poor, on an allegation that the elders had never been ordained, *M'Intyre*, 17 Feb. 1830, viii. S. 549. An applicant for the benefit of the poor's roll, having got his certificate signed by two parties, designing themselves elders, and also by the minister of the parish, it was held, that the subscription of the minister implied his attestation that the other subscribers were elders, and, therefore, that the petition should be remitted to the lawyers for the poor, notwithstanding an allegation that these parties had never been ordained elders, *A. B. v. C. D.*, 26 Nov. 1833, xii. S. 127. An application for the benefit of the poor's roll was remitted to the lawyers and agents for the poor, though

the certificate of the kirk-session merely bore, that the truth of the applicant's statement rested on his declaration alone, and that they knew no reason to doubt his credibility, but without bearing positively that they knew him to be worthy of credit, *Cumming*, 27 Jan. 1831, ix. S. 342. In an anonymous case, *A. B.*, 21 June 1832, x. S. 673, circumstances occurred in which the Court remitted a cause to the counsel for the poor, although the certificate signed by the clergyman was rested solely on the statement of the applicant, who was not personally known to the clergyman. A minister and elders having certified that the credit of an applicant's statement rested solely on himself, the Court remitted again to the minister and elders, *Paton*, 30 Nov. 1832, xi. S. 146. In *Craigie v. Croll*, 10 Feb. 1832, x. S. 315, the Court granted warrant to cite two elders who had declined granting any certificate to a party applying for the benefit of the poor's roll, to give evidence at the bar as to their knowledge of the applicant's condition, &c. Where a clergyman refuses to give a certificate to a party applying for the benefit of the poor's roll, the Court will cite him to give evidence at the bar as to the applicant's condition, *Glass*, 7 Mar. 1833, xi. S. 543.

§ 4. " Ten days' previous intimation, by letter post paid, shall be given to the adverse party, of the time and place fixed for making the said declaration or statement before the minister and elders, the dispatch of such letter to be certified by the agent of the pauper, or by a messenger-at-arms, or other officer of the law, and one witness, the certificate to be in the form of schedule B, hereto annexed."

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1 " I, \_\_\_\_\_, [*agent or messenger*], certify that of the date hereof I put into the post office of \_\_\_\_\_, between the hours of \_\_\_\_\_ and \_\_\_\_\_, in the presence of A. B., residing in \_\_\_\_\_, and hereto subscribing, a letter or notice addressed to " C. D., merchant in \_\_\_\_\_, " intimating that \_\_\_\_\_ is to

Intimation of ten days of the diet fixed for the declaration before the sheriff seems to be necessary, as in the case of that before the minister and elders; *M'Coll v. Downie*, 7 July 1827, noticed by Dunlop, 470. Where a party petitioned for the benefit of the poor's roll, in order to lodge a claim in a multiplepinding, where there were above 100 competing claimants, the Court in the circumstances, without requiring special notice to each of the claimants, ordered intimation of the petition on the walls, and in the minute-book, and notice to the raiser of the multiplepinding; *Grassie*, 24 Nov. 1836, xv. S. 116.

§ 5. " The said declaration of the party and certificate of the minister and elders, with the certificate of intimation to the adverse party, shall be transmitted, free of expense, to one of the agents for conducting the causes of the poor for the time, and shall, at the distance of not more than three months from the date of the declaration, and as much sooner as circumstances will permit, be lodged, with an inventory thereof, in the office of one of the principal clerks of session ; and if the same shall appear to him or his assistant to be correct, notice thereof shall be forthwith entered in the minute-book, in the form of the intimation at present given on applications for admission to the benefit of the poor's

appear before the minister and elders of the parish of  
within the manse [*or wherever the minister and elders may fix*], upon  
, at o'clock noon, for the purpose  
of emitting a declaration, in terms of the act of sederunt, with a view to  
his [*or her*] admission to the poor's roll, to enable him [*or her*] to carry  
on a lawsuit, in the Court of Session, against the said C. D. [*or*] in which  
the said C. D. is pursuer. Witness my hand at , this  
day of 184

**Signature of**

**Witness.**

### Schedule B.

**Signature of**

**Agent or Messenger."**

roll. And on the elapse of eight days after the date of insertion in the minute-book, or of four days next after publication of the printed minute-book containing said intimation, if the papers shall have been lodged during vacation or recess,—the party's agent shall box a note to the Lord President of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa*; on moving which the Court may, on hearing any objections, either refuse the application *de plano*, or remit to the reporters, who, on considering the party's case, and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's roll: said report not to be made sooner than six days from and after the date of the remit, except with consent of the adverse party. And the Lords declare, that if the application shall not be forthwith proceeded in before the reporters, and if their report be not lodged within three months next after the date of the remit, it shall, *ipso facto*, be held as abandoned and out of Court, without prejudice to the party again applying for new certificates, as hereinbefore directed."

The important question, who are entitled to sue *in forma pauperis*, may be noticed under this section. It is of course impossible to lay down any rule even approaching to a general one. Each case must be determined upon its own specialties. The following decisions have been given by the Court:—

In the case of *Paul*, 3 Mar. 1803, F. C. M. 14,983, the benefit of the poor's roll was refused to a person possessed of a small encumbered heritable subject, the reversion of which would, if applied to the expenses of the action, have left no means to support the family. But subsequently the Court held that it is no objection to a party getting the benefit of the poor's roll that he has heritable

property, if he be unable to support himself, *A. B.*, 24 May 1814, F. C. A clerk, with an income of about £30 yearly, was refused the benefit of the roll, *Wallace*, 11 June 1823, ii. S. 391, Note, (N. E. 348); but in *Mackintosh v. M'Kenzie*, 26 Nov. 1829, viii. S. 123, it was stated from the bench, that the question whether a party be in such poverty, as to claim the benefit of the poor's roll, depends on the circumstances of each case; and that the decision in the above case of *Wallace* was not intended to fix a general rule. A bachelor, having an income of £54. 12s., was held not entitled to the benefit of the roll; *Hunter v. A. B.*, 11 Dec. 1829, viii. S. 223.

A married man, with an income of £40. 8s. per annum, and having only one child twelve years old, was refused the benefit of the poor's roll; *Drysdale v. A. B.*, 19 Dec. 1829, viii. S. 276. A man with one child, having a house rent free, with the use of coals and candles, and an income of £46. 16s. per annum, was refused the benefit of the poor's roll, Lord Gillies remarking, "It is of the greatest moment to prevent an abuse of the poor's roll. It is not enough that it should be inconvenient, or even highly inconvenient, for a party to bear the expense of litigation; he must make out a case of necessity, or we cannot listen to his petition;" *Christie v. A. B.*, 14 Dec. 1830, ix. S. 169, and the same decision was given in the case of an unmarried labouring man with an annuity of £52, in addition to the profit of his labour; *Leslie v. A. B.*, 10 Feb. 1832, x. S. 315. A gentleman's servant, whose income was stated to be £24 per annum of wages, out of which he had to support a child, was found entitled to sue *in forma pauperis*, chiefly on account of the precarious nature of his income; *A. B. v. C. D.*, 3 Mar. 1832. x. S. 425. An application by a man aged seventy, who had a wife and children to support, and had been lately disabled from work for a time, in consequence of fracture of a thigh bone, was remitted to the lawyers for the



poor, although he had a bond of annuity for £30; *A. B. v. Patton*, 7 Feb. 1833, xi. S. 360.

A defender, in an action of damages, who was between fifty and sixty years of age, had a family, and possessed an annuity of £24, besides 8s. per week of wages as a shoemaker, was held entitled to the benefit of the poor's roll, but the case was very special; *Gunn v. Goodall*, 25 Jan. 1834, xii. S. 336. A lieutenant aged forty-three, who had a wife and five children, with half-pay of £82, was, though with difficulty, refused the benefit of the poor's roll; *A. B. v. Scott*, 26 Feb. 1834, xii. S. 489. A man of middle age, and fit for work, who had £50 in the bank, and who had a few years before paid £200 for heritage yielding £6 per annum, was held not to be in such circumstances as to warrant his getting on the poor's roll; *A. B. v. C. D.*, 14 June 1836, xiv. S. 965. A party having a *probabilis causa litigandi*, and who had continued to defend himself without the aid of the poor's roll till the eve of a jury trial, was, in special circumstances, allowed the benefit of the roll, although he was in the receipt of weekly wages to the amount of £96 per annum; *Miller v. Gordon*, 8 Mar. 1838, xvi. S. 812. A party, aged fifty-nine, who had a wife but no children, was earning wages at about the rate of 5s. per week, but was afflicted by bodily infirmity so as to make his wages precarious, and he enjoyed a pension of £18. 15s. 5d. as a discharged soldier; was held entitled to the benefit of the poor's roll; *Meikleham v. McGruthar*, 10 July 1840, ii. D. 1372. A widow, having an alimentary income of £41, was found entitled to the benefit of the poor's roll,—she being above sixty years of age, in infirm health, and called as a defender in an action raised by a body of creditors to reduce her title to a small property, the rents of which were, in the meantime, arrested, and the action would involve the expense of a jury trial; *Bett v. ———*, 18 July

1840, ii. D. 1466. An application by a husband to be admitted on the poor's roll in order to raise and carry on an action against his wife, was refused *hoc statu*, the applicant being in receipt of wages at the rate of £1 per week; *King v. King*, 22 Feb. 1845, vii. D. 499. In an action of divorce by a husband against his wife, the Lord Ordinary ordered him to pay her £8 to enable her to conduct her defence. The husband being unable to pay this sum, presented an application for a remit to the reporters on the *probabilis causa*, with a view to being admitted to the poor's roll. The Court granted the application, on condition of his undertaking to have his wife put on the poor's roll also, at his own expense, *Gibson*, 4 Mar. 1845, vii. D. 581. A party who, in a reduction at his instance, was admitted to the poor's roll, was also put on it of consent, in a counter action of declarator raised against him, *M'Dowall*, 23 Nov. 1837, xvi. S. 103. In every petition for the benefit of the poor's roll, the nature of the action should be stated; *Duncan*, 28 Jan. 1846, viii. D. 411. It is premature, in an application for the benefit of the poor's roll, to object, when it is moved to be remitted, that the pecuniary circumstances of the applicant are such as not to entitle him to be put on the roll; *A. B. v. C. D.*, 23 Dec. 1837, xvi. S. 306.

The Court refused to review the judgment of the lawyers and agents for the poor, on the matter of *probabilis causa*; but the applicant not having been fully heard, they remitted to hear him farther; *Currie*, 21 Jan. 1829, vii. S. 302. The Court held it incompetent for them to review the judgment of the counsel for the poor, as to the question of *probabilis causa*, *A. B. v. C. D.*, 19 Nov. 1833, xii. S. 58. A warrant was granted to transmit a process from an inferior court, to enable the lawyers for the poor to judge of the *probabilis causa*, *Stewart*, 16 Dec. 1829, viii. S. 252. It was held no objection to effect being given to a report by the lawyers and

agents for the poor, (as to a party in a pending process having a *probabilis causa litigandi*), that the Lord Ordinary before whom the case depended, had decided against him, *Gibb*, 15 June 1833, xi. S. 732. It is the exclusive privilege of the counsel, to judge whether there be *probabilis causa*, although the agents may differ from them, *Clerk v. Campbell*, 6 July 1833, xi. S. 908. A petition by a party who had applied for the benefit of the poor's roll, and been refused, set forth that his application had not been duly investigated by the lawyers for the poor; the petition was refused, in respect there had been a formal report against a *probabilis causa*, and the petition therefore resolved into an allegation, that the lawyers for the poor had formed an erroneous judgment, which was no ground of legal complaint, unless corruption had been alleged. It was also observed, that the petition was irregular in form, inasmuch as it was not signed by counsel, *Irvine*, 22 Dec. 1842, v. D. 372. Where the counsel to whom the case had been remitted, differed in opinion, a new remit was made to other counsel, *McCallum*, 26 June 1841, iii. D. 1102.

§ 6. "When the Court shall find the applicant entitled to the benefit of the poor's roll, the application, together with the cause of the party to which it relates, shall be remitted, as at present, to one advocate, one writer to the signet, and one solicitor, whose names shall be taken in *regular rotation* from the lists of the counsel and agents for conducting the causes of the poor; and the clerks of court are hereby prohibited from deviating, on any account whatever, from the regular course hereby prescribed, except with the express authority of the Court, and upon cause shewn."

§ 7. "The counsel and agents so appointed to conduct the pauper's cause, shall continue to do so till its conclusion, or as long as the applicant remains on the poor's roll, notwithstanding they may have ceased to be advocates and agents

for the poor ; and an entry of the admission or the refusal of the application shall be inserted in the minute-book as at present."

§ 8. " All warrants for admission to the benefit of the poor's roll shall remain in force during the dependence of the cause, unless the opposite party shall allege that such a change in the pauper's circumstances has taken place, since the date of his admission, that these would not then entitle him to the usual certificates : And on such allegation being minuted on the interlocutor sheet, or by a short written note lodged in process, the cause shall be superseded, until a new declaration and certificate shall be obtained and lodged in process, on considering which, the Court, or the Lord Ordinary before whom the cause depends, shall find therein, as shall seem just : And if the allegation shall appear to have been made without any probable grounds, the party making it shall *de plano* be decerned to pay such a sum of modified expenses, as may seem reasonable in the circumstances ; and the judgment shall not be subject to review : Provided always, that when a party shall be admitted to the benefit of the poor's roll, before having raised and executed the principal action, it shall be incumbent upon him or her to raise and execute the same against the opposite party at farthest within three calendar months after the date of admission, otherwise the warrants thereof shall be held as recalled, and the same to be thereby recalled accordingly."

§ 9. " At any stage during the dependence of a poor roll cause, if any circumstances shall emerge, whether from the judicial statements, pleas, or productions of parties, which, in the opinion of the Lord Ordinary, shew that the pauper has not a *probabilis causa litigandi*, it shall be competent to the Lord Ordinary to report the circumstances verbally to the Court, or to remit the process to the reporters for

their opinion : And if the Court or the reporters shall be of opinion that the pauper has no *probabilis causa*, he shall thereupon forfeit all right of exemption from payment of professional charges and dues of Court, in the future proceedings in the cause, unless upon caution being found, within a limited time, for payment to the opposite party of such expenses as he may be found entitled to, on the decision of the cause."

A pursuer of an action of damages was struck off the poor's roll, in respect he refused to accept of a sum reported to be proper and adequate, *M'Intosh v. M'Indoe*, 18 Dec. 1821, i. S. 218, (N. E. 207). In consequence of a tender of £20 of damages, besides expenses, to a pursuer on the poor's roll, his counsel reported that there was no longer a *probabilis causa litigandi*; on the motion of the defender, he was ordered to be removed from the poor's roll, *A. B. v. Fraser*, 8 July 1836, xiv. S. 1114.

§ 10. "In each spring vacation there shall be boxed to the Lord Justice-General a written report, in the form of schedule C,<sup>1</sup> certified by the lawyers and agents for the poor,

<sup>1</sup> "Report by the Lawyers and Agents for the Poor, prepared and given in in terms of the 10th Section of the Act of Sederunt.

MY LORD JUSTICE-GENERAL, (Date, in Spring Vacation).

In compliance with the Act of Sederunt above referred to, we beg humbly to report,—

Date of Admission.	1st, The causes actually proceeded in during the year ending 31st December last, and still in dependence, viz.—
... ..	1. <i>Poor Mary Hill v. Gray.</i>
... ..	2. <i>Poor T. Ross v. Tom.</i>
	[And so on.]
	2d, The causes compromised—
.. ..	1. <i>Poor J. Tod v. T. Hood</i> , before [or after] coming into Court, (as the case may be).
	[And so on.]

appointed in terms of § 1 of this act, for the preceding year, or any three of them, stating what causes have been actually proceeded in, or compromised before or after coming into Court, during the year ending 31st December preceding the date of the report; also what causes have been decided, or are still in dependence, with any special matter relating to the poor's roll generally, or to any particular case which they may think the Court ought to know, for the better regulation of poor roll causes; and the Court shall, if they think proper, appoint said report to be printed in the minute-book for the information of all concerned."

§ 11. "When the Court shall remit an application for the poor's roll to the advocates and agents appointed to consider and report on the *probabilis causa litigandi* as above, it shall be the duty of the writer to the signet or solicitor presenting the application, to procure from the applicant, or his former agent, information as to the circumstances of the case, and to draw out a memorial thereof, and lay the same

Date of  
Admission.

... ..

3d, The causes which have been decided—

1. Poor G. Hall v. J. Dow, in favour of G. Hall [or] J. Dow, (as the case may be). *State date of Decision.*

[And so on.]

... ..

4th, Causes not proceeded in—

[If any such, they may here be noticed.]

5th, Applications for the Poor's Roll refused in 1842.

1. Poor Ann Grant v. John Stowe, Esq., refused 4th June 1842.

2. Poor Robert Low v. Samuel Rae, Esq., refused 15th July 1842.

[And so on.]

*Any special matters to which it may be deemed necessary to call the attention of the Court will then be stated.*"—Schedule C.

before the reporters, for enabling them to make their report thereon, and shall at the same time intimate the lodgment thereof to the adverse party, or his agent, by letter post paid; and if further evidence or explanation appear to be necessary, either as to the poverty or character of the applicant, or circumstances of the case, the agent presenting the application shall direct and assist the applicant in procuring the same."

§ 12. "The names of the advocates and agents appointed to conduct the cause shall be marked on the margin of the summons or defences, or notes of advocacy or suspension, and on the back of every subsequent paper given in for that party in the cause, and no enrolment shall be made except by the agent appointed as above, nor in the name of any advocate, except the counsel so appointed, and the word "poor" shall be prefixed to the name of said party on every paper given into court;" *Panario*, *infra*, p. 533.

§ 13. "No other advocate or agent than those appointed in terms of this act shall be employed, or allow their names to be used, in any stage of the cause, unless on application to the Lord Ordinary or the Court by note, to be signed by the advocate or agent already appointed, the assistance of one of the other advocates or agents for the poor shall be specially authorised; in which case those first appointed, and those so added, shall thereafter act conjunctly in the cause: Provided always, that if the agent or agents appointed to conduct any poor roll cause shall neglect or refuse to do so, or if any other agent or agents shall act in any such cause, without the authority of the Court or Lord Ordinary, as herein provided, or shall otherwise infringe the regulations contained in this act, they shall not only forfeit all claim for expenses against the parties, but shall, moreover, be liable to public censure from the Court upon a written note for

either party, to be boxed, to the President of the division to which the cause belongs, stating the facts."

The Dean of Faculty, at the request of a counsel for a party on the poor's roll, having given his assistance to the party, and before pleading, having called the attention of the Court to A. S. 16 June 1819, which prohibits any other than a counsel for the poor to appear for a poor party, held that it did not apply to this case; *Garvie v. Hammermen of Perth*, 3 July 1832, x. S. 758, foot note. Under the former act of sederunt senior counsel was held entitled, on application to them by counsel for the poor, to act in a poor's cause, without the special authority of the Court; *Bell v. Murray*, 7 Dec. 1833, xii. S. 187.

§ 14. "In case of neglect or failure in any of the particulars above specified, the Court, on the application of the adverse party, shall open up and set aside the previous proceedings in the cause, and deprive the party of the benefit of the poor's roll, or may apply such other remedy as the circumstances of the case may require."

§ 15. "The expense of the application, and procedure thereon, for admission to the poor's roll, shall at no future period form any charge at the instance of the agent against the pauper, except to the extent of the actual outlay of the agent; (see *Taylor v. Barr*, p. 533). And farther, that the said expenses of admission shall form no part of the charge for "expenses of process" which may afterwards be found due against the adverse party in the principal cause: Reserving, however, to the Inner house, at the time of the admission, if there shall appear to have been unreasonable or vexatious opposition to the applicant's admission, to dispose of the matter of expenses thereby occasioned as to their Lordships shall seem proper." Before the passing of this A. S., decree for expenses was held to include the expense of getting the pauper put upon the roll, (which often led to great abuse); *Ca-*



*meron v. McKinnon*, 25 June 1814, F. C.; *Rankine v. Rankine*, 31 May 1821, i. S. 44, note, (N. E. 47).

§ 16. "Whereas doubts have been entertained as to the extent of the exemption in poor roll causes, from payment of the fees contained in the schedule annexed to 1 and 2 Vict. c. 118; and it is necessary and proper to regulate and determine that matter, for the guidance and direction of the clerks and officers of court: And whereas, on considering the note annexed to said schedule, whereby it is stated that the fees therein "shall not apply to maritime or consistorial causes, nor to *applicants* for the benefit of the poor's roll, or *persons* pursuing or defending in *forma pauperis*," it appears that the exemption is not extended, as in other cases, to causes on the poor's roll, but is restricted to the "*applicant or person* pursuing or defending" in such causes; and that the exemption does not, in any sense, extend to the *adverse party*, who may ultimately be found liable in the ordinary expenses of process;—it is hereby declared, that where a person pursuing or defending in *forma pauperis* shall be found entitled to expenses of process, it is competent and necessary, according to the spirit and intention of the said act, and consonant with the practice previous to the passing thereof, to charge the ordinary fees of court in his account, including all dues of extracts issued or to be issued, in the same manner as if he had not been upon the poor's roll: And the Lords accordingly ordain that, as heretofore, on the said expenses being recovered, the amount thereof shall be accounted for to the several parties interested, and the fee-fund dues paid to the collector of the fee-fund, with the amount whereof he shall debit himself in his books, in presence of the agent or party paying the same, and this shall be a sufficient discharge." See *Calder v. Parker*, 29 Jan. 1841, iii. D. 477.

§ 17. "For the better regulation and security of all concerned in the recovery and application of such accounts of

expenses, it is enacted that from and after the passing of this act, the agents, in making out the same, shall make an abstract at the end thereof, stating the amount—

1st, Of his own professional charges.

2d, Fees to counsel and clerks.

3d, Fee-fund dues.

4th, Printing, or other outlay,—

And the auditor of court, on such accounts being presented for taxation, shall require the agent to furnish him with a copy of said abstract, and shall delay auditing the account till it is furnished: And he shall keep a chronological list of said accounts, with the names of the agents therein, and shall subjoin to each entry, in said list, a copy of the abstract of each of the four heads, both as *charged* and as *taxed*: And a copy of the said list, and of the articles 2 and 3 of the abstract as taxed shall, once every six months, beginning on the 1st of July 1843, be transmitted to the office of the collector of the fee-fund, to be there patent to all concerned: And the collector, for the better exoneration of the agent entrusted with the recovery and application of said expenses, shall, on proper evidence being exhibited to him, mark such articles in said list as shall appear to have been discharged, with the word “paid:” And if the same shall not appear to have been recovered and paid within three months after the date of taxation, the said collector shall have power to call for such evidence or explanation, as the circumstances of the case may seem to require: And, at any rate, he shall annually, not less than eight days before the meeting of the court in May, report to the Lord Justice-General a copy of the said lists for the year preceding, shewing the sums paid and those outstanding, with such additional information as shall seem necessary: And the Lords shall give such orders and directions thereanent, as in the circumstances they may deem meet.”

This subject may be concluded with a notice of the following decisions of the court, which do not properly fall under any of the sections of the Act of Sederunt.

A defender, by entering on the merits, was held barred from objecting that a pursuer pursuing, *in forma pauperis*, had never obtained the benefit of the poor's roll, *Plowman v. Keith*, 1 Dec. 1823, ii. S. 543, (N. E. 474). A reclaiming petition by a party on the poor's roll having been dismissed as incompetent, as not being marked by a clerk, the Court refused to repon him, without payment of previous expenses, *Pratt v. Lord Dundas*, 9 June 1824, iii. S. 120, (N. E. 79). A pursuer on the poor's roll, residing beyond the jurisdiction of the Court, is not bound to sist a mandatory who shall be liable in expenses if awarded, *Carling v. Campbell and Crystal*, 10 Mar. 1826, iv. S. 548, (N. E. 556). An Englishman on the poor's roll executed on a depending action before the Court of Session an arrestment of a ship which was loosed by a cautioner granting bond to make her forthcoming; the cautioner, eight years thereafter, presented a petition offering to deliver her up, which was opposed by the foreigner, along with a mandatory; held, that although the foreigner was not on the poor's roll so far as concerned this application, yet he was entitled to the benefit thereof, to the effect of the mandatory not being responsible for the expenses of process; *Middlemas v. Brown*, 9 Feb. 1828, vi. S. 511; (*supra*, p. 156). A party on the poor's roll who has executed a disposition *omnium bonorum*, is not obliged to find caution for expenses; but observed, that it is not incompetent to oblige him to make payment of expenses previously awarded, before allowing him to proceed with his action, *Barry v. Geddes*, 30 May 1827, v. S. 727, (N. E. 678). A reclaiming note against a decree in absence was received without payment of the fee fund, in consequence of the word "Poor" being written before the party's name, and the party was re-

poned in virtue thereof ; but, in point of fact, he was not on the poor's roll, nor his agent one of the agents for the poor ; found that the proceeding was unwarrantable and illegal, and could not stop the finality of the interlocutor, *Panario v. Turner and Cairns*, 5 Mar. 1828, vi. S. 695. It is no objection to a party getting on the poor's roll that she may be unable to pay previous expenses, before she can be reponed against an interlocutor, that being a subsequent question, *Sassen v. Sir J. Campbell*, 2 Mar. 1831, ix. S. 533. An objection that an applicant for the poor's roll was a married woman, and had not her husband's concurrence, stated after the lawyers had reported a *probabilis causa*, was held to be competent and omitted *quoad hoc*, but that it would be open to the objector to plead it *in causa*, *A. B. v. C. D.*, 12 Dec. 1833, xii. S. 197. It is not sufficient to exclude a party from the benefit of the poor's roll, whose averments are relevant, that no evidence is adduced in support of these averments, *Wilkie v. Flowerdew*, 8 Mar. 1836, xiv. S. 668. An agent for a pursuer on the poor's roll, having obtained decree for a sum of damages and for expenses against the defender, and having thereafter got decree in an action against the pursuer, for the expenses not awarded against the defender, in virtue of which, and of a decree in a multiplepinding raised by the defender as to the sum of damages, he got payment,—it was held in a reduction of the decree by the pursuer, involving the question as to the right of the agent to recover expenses from him, that the agent had right to do so, out of any fund belonging to him ; but it was observed that he would not be permitted to operate payment by personal diligence, *Taylor v. Barr*, 11 Mar. 1841, iii. D. 892. If a husband sue a divorce in *forma pauperis*, his wife can claim no expenses from him, except such as she must incur, if she were on the poor's roll, and she may be admitted to the roll, *M'Gregor v. M'Gregor*, 8 July 1841, iii. D. 1191. Two parties joined

in an action of reduction, but the action at the instance of one was dismissed, as he failed to give caution as an undischarged bankrupt. The instance was then proceeded in by the other, and he obtained the benefit of the poor's roll. The defender then discovered that the pursuer had, before the action was brought, assigned away his interest, and he accordingly objected that the action could not proceed till the assignee should sist himself as a party. The Lord Ordinary sustained the motion, when the pursuer reclaimed, lodging a retrocession by the assignee. The Court, after the judicial examination of the assignee, being of opinion that he was all along the true *dominus litis*, held that the action could not proceed until the defender received payment of the expenses he had incurred, by the preliminary discussion occasioned by the concealment of the assignee's interest, for whose behoof the action had been insisted in, *Walker v. Kelty's Tr. &c.*, 21 June 1839, i. D. 1066; 29 May 1841, iii. D. 967; 23 Mar. 1843, iii. S. and M'L. 150.



